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[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, MR. JUSTICE KING AND MR. JUSTICE PATANJALI SASTRI.

M. Lakshmana Aiyar and another .. *Appellants* (Defendants 1 and 2)*

v.

Aiyasami Chettiar and another .. *Respondents (Plaintiff and 3rd Defendant).*

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Lakshmana Aiyar
v.
Aiyasami Chettiar.

Madras Estates Land Act (I of 1908), Ss. 112 and 146—Assignee of registered pattadar recognised as ryot by landlord—Default in payment of rent—Assignee if can be proceeded against as 'defaulter'.

The transferee of a holding from a ryot was recognised as ryot by the landlord. The pattas however continued in the name of the transferor. After the death of the transferor the transferee was proceeded against as a "defaulter" and his holding was purchased by the landlord. On a contention that the procedure was illegal,

Held, the term 'defaulter' in S. 112 of the Estates Land Act would include a transferee of the whole or part of a holding, whom the landlord was not obliged to recognise under S. 146 but whom in fact he had recognised as a ryot and the sale of the holding was valid.

The Midnapore Zemindari Co., Ltd. v. *Muthappudayan*, (1920) 40 M.L.J. 213: I.L.R. 44 Mad. 534, considered and *Zamindar of Ettayapuram* v. *Sankarappa Reddiar*, (1903) I.L.R. 27 Mad. 483 (F.B.), relied on.

Appeals against the decrees of the Court of the Subordinate Judge of Dindigul in Appeals Nos. 50, 51 and 52 of 1936 preferred against the decrees of the Court of the District Munsif of Palni in O. S. Nos. 35, 637 and 638 of 1935 respectively,

*S. As. Nos. 353 to 355 of 1937. 25th October, 1940.

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on an order of reference to a Full Bench* by the Chief Justice and Horwill, J.*

T. M. Krishnaswami Aiyar and *N. Sivaramakrishna Aiyar* for Appellants.

T. P. Gopalakrishnan and *L. K. Sarma* for Respondents.

The Order of Reference to a Full Bench was made by

The Chief Justice.—In *The Midnapore Zemindari Co., Ltd.* v. *Muthappudayan*[1], a Bench of this Court consisting of Sadasiva Aiyar and Spencer, JJ., held that the expression "defaulter" in the Madras Estates Land Act, 1908, denotes only the person who is the registered pattadar or the heir of the registered pattadar or the person whom the landholder has become bound to recognize as the ryot by reason of the provisions of S. 146 of the Act. It has been contended by Mr. Krishnaswami Aiyar in this case that this definition is too limited and that the word "defaulter" includes a person who is in fact recognized by the landholder as his ryot. In the case now under consideration it is common ground that the first respondent purchased lands from pattadars of the appellant, that for many years he has cultivated those lands and has paid cist in respect of them to the appellant and that for a number of years pattas were issued to him, but in the names of the deceased pattadars. The evidence adduced by the appellant is to the effect that on the pattas issued to the respondent the word "அநுபோகம்தார்" (*anubhogamdar*) and the respondent's name were endorsed signifying that he was in enjoyment of the pattas In these circumstances it may be that the appellant's contention that the definition of the expression "defaulter" in *The Midnapore Zemindari Co., Ltd.* v. *Muthappudayan*[1] is too limited is well founded. The question is one of general importance and consequently we refer for the decision of a Full Bench this question:

"Does the expression 'defaulter' in the Madras Estates Land Act denote only the person who is the registered pattadar or the heir of the registered pattadar or the person whom the landholder has become bound to recognize as the ryot by reason of the provisions of S. 146 or does it also include a person who has been accepted by a landholder as his ryot and has defaulted in the payment of his rent."

The Court expressed the following

Leach, C.J.

OPINION†: *The Chief Justice.*—The question which has been referred for decision is this:

"Does the expression 'defaulter' in the Madras Estates Land Act denote-

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* 17th September, 1940.

1. (1920) 40 M.L.J. 213: I.L.R. 44 Mad. 534.

† 25th October, 1940.

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only the person who is the registered pattadar, or the heir of the registered pattadar, or the person whom the landholder has become bound to recognize as the ryot by reason of the provisions of S. 146, or does it also include a person who has been accepted by a landholder as his ryot and has defaulted in the payment of his rent."

The reference arises under the unamended Act and has been occasioned by the definition of the word 'defaulter' given by Sadasiva Aiyar, J., in *The Midnapore Zemindari Co., Ltd.* v. *Muthappudayan*[1]. When the appeal out of which the reference arises was before the Bench responsible for making the reference it was contended that the definition was too limited in its scope and as it appeared that there was foundation for this argument it was decided to place the question before a Full Bench for decision. Before proceeding to discuss the question it will be helpful in appreciating its full implication to set out the admitted facts.

The respondent who was the plaintiff in the suit purchased three holdings from registered *pattadars* of the appellant, who owns a *zamindari* in the Madura district. The first purchase was made in 1900, the second in 1906 and the third in 1911. All the transfers were effected by registered conveyances. The appellant accepted the respondent as his ryot and the respondent year by year paid to him the agreed rent. The appellant issued *pattas* to the respondent, but these did not bear his name. In each case the name of the registered *pattadar* was inserted. There is no question that the registered *pattadars* had parted with their interests in these holdings and that the respondent had acquired their interests in full. The *pattas* issued to the respondent were intended to be his *pattas* and were accepted by him as such, but he did not tender *muchilikas* in exchange. In 1931 the respondent defaulted in the payment of his rent and the appellant served upon him a notice of his intention to sell the holdings under the provisions of S. 112 of the Madras Estates Land Act, 1908. The respondent did not contest the appellant's right to sell and in due course the Collector directed that the holdings should be sold for arrears of rent. The sale took place on the 31st October, 1933, and at the Court auction the appellant bought the *kudiwaram* rights in the holdings.

Before the procedure contemplated by S. 112 can be adopted the relationship of landholder and ryot must exist. The respondent was undoubtedly a tenant of the appellant

1. (1920) 40 M.L.J. 213: I.L.R. 44 Mad. 534.

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within the meaning of the Estates Land Act, but was he a ryot? S. 3 (15) of the Act says that a ryot must be a person who holds for the purposes of agriculture *ryoti* land in an estate on condition of payment to the landholder the rent which is legally due upon it, but it is contended that before a transferee can become a ryot so as to be a defaulter within the meaning of S. 112 procedure of the nature contemplated by S. 145 must have been followed. S. 146 (1) says:—

"Whenever a holding or any portion thereof is transferred by the act of a ryot, or in execution of a decree or order of a Civil Court passed against him, or by a sale for arrears of Government revenue or for any demand recoverable as such arrears, such transfer shall, subject to the provisions of S. 145, be recognized by the landholder if notice in writing be communicated to him by the transferor and transferee or a certified copy of a decree or order of a Civil Court establishing a transfer is produced, or in cases in which a transfer is effected by sale under the order of any Court or public officer, the sale certificate or a certified copy thereof is produced."

There is direct support for the respondent's contention to be found in *The Midnapore Zamindari Co., Ltd.* v. *Muthappudayan*[1]. It was there held by Sadasiva Aiyar, J., in a judgment in which Spencer, J., concurred, that the word 'defaulter' in the Madras Estates Land Act denotes only the man who is the registered *pattadar*, or his heir, or the person whom the landholder has become bound to recognize as the ryot under S. 146 of the Act. While no exception can be taken to the decision of that case on the merits it is manifest that this definition is too limited. There is nothing in S. 146 or elsewhere in the Act which says that a landholder shall not accept a transferee as his ryot unless the section is complied with. The landholder is bound to accept a transferee who complies with the requirement of S. 146, but he may, if he chooses, accept him without being served with a notice in writing or a certified copy of a decree or order of a Civil Court establishing the transfer or by the production of a sale certificate, whichever is appropriate.

Now in the present case there can be no doubt that the respondent was a ryot within the meaning of the Act. He was in possession, for the purposes of agriculture, of ryoti land in an estate on condition of paying to the landholder the stipulated rent, and from time to time *pattas* were issued to him. The fact that they were not issued in his name, but in the names of his transferors makes no difference, as was decided by this

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Court in *Zamindar of Ettayapuram* v. *Sankarappa Reddiar*[1]. In that case *pattas* had been issued to a transferee, not in his own name but in the name of his transferor. Russell, J., in dealing with the contention that these *pattas* were not valid said:

"Assuming that *pattas* drawn up in precisely the same manner had been accepted for a series of years previous to Fasli 1308, in respect of this holding, then, I consider that the plaintiff would in this suit be estopped from asserting that the *patta* is improper.

Under such circumstances, if there was a tender of the *patta* to the plaintiff, though it ran in the name of the first defendant, it would not be open to the plaintiff now to object to it. This seems to me to be in principle what was decided by the Court in *Sree Sankarachari Swamiar* v. *Varada Pillai*[2] and also in *Govinda Setti* v. *Sreenivasa Rao Sahib*[3] (unreported)."

In this case fresh *pattas* were issued to the respondent and notwithstanding that they contained the names of the transferor he accepted them as *pattas* issued to himself and embodying the terms of his tenancy. S. 53 of the Act says that no landholder shall have power to proceed against a ryot for the recovery of rent by distraint and sale of his movable property or by sale of his holding under Chapter VI unless he shall have exchanged a *patta* and *muchilika* with such ryot or tendered him such a *patta* as he was bound to accept or unless a valid *patta* or *muchilika* continues in force. But when a *patta* is tendered and accepted it governs the rights of the parties, notwithstanding that the tenant has failed to exchange a *muchilika*. S. 52 (3) provides for this. The respondent having accepted the first *patta* tendered to him became a ryot within the full meaning of the Act and as he defaulted in the payment of his rent he became a defaulter within the meaning of the Act which entitled the landholder to proceed against him under S. 112.

The position may be stated in this way. Before the Madras Estates Land Act can apply the relationship of landholder and ryot must exist, but this relationship is not confined to the landholder and (*a*) the person who is the registered *pattadar*, or (*b*) the heir of the registered *pattadar*, or (*c*) the person whom the landholder has become bound to recognize as the ryot by reason of the provisions of S. 146. The landholder may recognize a transferee of a registered *pattadar* without any formality and if he does the transferee becomes a ryot within

1. (1903) I.L.R. 27 Mad. 483 (F.B.). 2. (1903) I.L.R. 27 Mad. 332.
3. S. A. No. 1331 of 1901.

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the meaning of Act, but before action can be taken under S. 112, S. 53 requires that the landholder shall have issued a *patta* to the transferee, not necessarily bearing his name, but a *patta* which is intended to be the transferee's *patta*. If the transferee accepts it all the provisions of the Act apply to the relationship between the two.

We answer the reference in this sense. The costs of the reference will be made costs in the cause.

K. S. *Reference answered.*

[The division bench allowed the appeal as a result of the opinion of the Full Bench.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

Ramaswami Udaiyar and another .. *Appellants** (*Petitioners*)

v.

Sevu Ramu Aru Ramanathan Chettiar and another. *Respondents* (*Respondents*).

Ramaswami Udaiyar v. Ramanathan Chettiar.

Madras Agriculturists' Relief Act (IV of 1938), S. 19—Application for scaling down a decree against which appeal was pending—Dismissal of application for scaling down—Appeal against order not clubbed with main appeal against the decree which was allowed to proceed ex parte *by the applicant—Appeal against order infructuous as appellate decree had been substituted for decree sought to be scaled down.*

S. 19 of Madras Act IV of 1938 has no application to decrees passed after the Act came into force, one reason being that any person who has a contention to urge which will affect such a decree must urge it in the pending proceedings, and if he does not so urge he must be taken to have waived it. There is no reason to apply a different principle to proceedings in appeal of which the affected party has notice. Accordingly where an application to scale down a decree (against which an appeal is pending) is dismissed, and an appeal against such order of dismissal is not clubbed with the main appeal which is allowed by the debtor to proceed *ex parte*, then after the disposal of the main appeal substituting the appellate decree for the decree sought to be scaled down, the original decree cannot be scaled down and the appeal against dismissal of the application for scaling down under S. 19 becomes infructuous and must be dismissed.

Appeals against the order of the District Court of Salem dated 26th September, 1938 and made in R. E. A. No. 72 of 1938 in R. E. P. No. 26 of 1937 in O. S. No. 5 of 1935 and petitions praying that in the circumstances stated in the affidavit

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*C. M. As. Nos. 643 and 644 of 1938 and C. M. Ps. Nos. 704 and 705 of 1940. 19th September, 1940.

filed therewith the High Court will be pleased to convert the said A. A. Os. into C. R. Ps.

Ramaswami Udaiyar v. Ramanathan Chettiar.

G. N. Chari for Appellants.

K. S. Ramabhadra Aiyar and *P. Sridhara Rao* for Respondents.

The judgment of the Court was delivered by

Wadsworth, J.

Wadsworth, J.—The Civil Miscellaneous Appeals are preferred against the order of the District Judge rejecting applications filed in one case under Ss. 8 and 19 and in the other case under Ss. 20 and 23 of Act IV of 1938. The Civil Miscellaneous Petitions have been preferred owing to the doubt whether a Civil Miscellaneous Appeal would lie praying that these appeals may, if necessary, be converted into Civil Revision Petitions. We have heard these matters on a preliminary objection without deciding the question whether the proper form should be an appeal or a revision petition. The decree out of which these applications arose was passed on the 23rd October, 1935. In February, 1936, the decree-holder preferred an appeal to the High Court the main objection taken in appeal relating to the rate of interest. There was no stay of the lower Court's decree and the decree-holder proceeded with its execution while the appeal was pending and in November, 1937, brought to sale the petitioners' property. In March, 1938, the executing Court recorded an agreement whereby the sale should be set aside on certain terms, which were in fact not fulfilled. In June, 1938, the petitioners preferred these applications, one being for stay and the other, though it is styled an application under Ss. 8 and 23 is in substance one under Ss. 19 and 23 of the Act. On 26th September, 1938, the lower Court dismissed these applications holding that Act IV of 1938 so far as it affected the provisions of the Negotiable Instruments Act was *ultra vires* of the Provincial Legislature. In these applications a counter-affidavit was filed in which attention was drawn to the fact that there was an appeal pending in the High Court against the trial Court's decree. The petitioners filed the present appeals against the dismissal of their applications. Instead of getting these appeals clubbed along with the appeal against the original decree, they allowed the main appeal to proceed *ex parte* and did not advance therein any claim that they might have, to scale down the debt under Act IV of 1938. On 6th April, 1939, the

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main appeal was disposed of, the lower Court's decree being slightly modified, but substantially the appeal failed.

Now the preliminary objection taken to the maintainability of these Civil Miscellaneous Appeals, assuming that an appeal lies (a matter on which we express no opinion) is that the appeals have become infructuous by reason of the substitution of the appellate decree for the original decree which the applicants sought to scale down. It seems to us that this objection must succeed. We have held that S. 19 of Madras Act IV of 1938 has no application to decrees passed after the Act came into force, one reason being that any person who has a contention to urge which will affect such a decree must urge it in the pending proceedings and if he does not urge it must be taken to have waived it. We see no reason to apply a different principle to proceedings in appeal of which the affected party has had notice. It may be that in some cases it will be necessary for a person who has applied under S. 19 to scale down the lower Court's decree to put in a separate application to the appellate Court to the same effect and that there will be some duplication of proceedings. But in the present case not even that was necessary, for the desired result could have been achieved by the simple process of asking that these Civil Miscellaneous Appeals and the connected petitions should be clubbed along with the main appeal.

It is difficult to see how when the appellate decree has taken the place of the lower Court's decree as the sole decree which can be executed, any practical result would be achieved by going on with the application to scale down the lower Court's decree. It is suggested that because there was an executable decree at the time when these applications were rejected this Court should decide whether or not the applications were rightly rejected and remand the proceedings if wrongly decided for fresh disposal by the trial Court, in order that the applicants might take such action as might be available to them to get the appellate Court's decree modified to give effect to the scaling down process. It seems to us that when once it is conceded that the decree which the applicants sought to amend is no longer an executable decree and that the decree which has been substituted for it in appeal cannot be scaled down under S. 19, the present proceedings attacking the lower Court's order have become infructuous. In this view therefore we dismiss

the appeals and the connected petitions, with costs in the appeal only (one set in each appeal). The memorandum of objections in C. M. A. No. 643 of 1938 is dismissed but there will be no order as to costs.

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K. S. *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

S. Venkiteswara Aiyar .. *Appellant* (Petitioner-1st Defendant)*

v.

T. N. Ramaswami Aiyar and others .. *Respondents.*

Venkiteswara Aiyar v. Ramaswami Aiyar.

Madras Agriculturists' Relief Act (IV of 1938), S. 19—Payments before 1st October, 1937, towards debt—Burden of proof as to appropriations.

Where it is conceded that certain payments made by the debtor had been adjusted towards the debt prior to 1st October, 1937, the adjustments must have been in reduction of either interest or principal. If the debtor is not able to show that they are in reduction of principal leaving interest outstanding on 1st October, 1937, he must fail, as the burden is on him to show that interest was outstanding on 1st October, 1937, and was wiped out by S. 8 of the Act. On this matter there is no difference in principle between the cases of bankers charging compound interest and other creditors charging simple interest.

Appeal against the order of the Court of the Subordinate Judge of Tinnevelly dated 16th October, 1939 and made in E. A. No. 347 of 1938 in O. S. No. 96 of 1928.

S. Ramaswami Aiyar for Appellant.

T. M. Ramaswami Aiyar for Respondents.

The judgment of the Court was delivered by

Wadsworth, J.

Wadsworth, J.—This appeal raises a question of appropriation with reference to an application under S. 19 of Madras Act IV of 1938. The appellant, who is the applicant in the Court below, was the first defendant in this suit.

The debt, so far as we need trace it back, starts with a principal of Rs. 7,250 as on 27th April, 1925, when a security bond was executed. Before the suit there were certain payments, the exact figure of which seems to be doubtful. The suit was filed in 1928 for a sum of Rs. 11,500. It ended in a decree which, so far as defendants 3 to 5 were concerned was based on a compromise and the same decree was made applicable

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* A. A. O. No. 36 of 1940. 28th October, 1940.

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to first and second defendants who allowed the suit to proceed *ex parte*. The decree provided for a payment of Rs. 12,116, within four months or in default for payment of Rs. 14,116, with interest at six per cent. No payment was made. The hypotheca mortgaged under the security bond was sold and realised Rs. 5,420 which was credited to the decree and part satisfaction was recorded. An application was preferred for a personal decree for the balance. We have not got this actual application before us, but the personal decree indicates that Rs. 5,420 realised by the sale was credited and presumably it must have been credited first towards interest due on the decree amount and then towards the principal sum decreed. For the balance, a personal decree was passed. Thereafter there were two payments aggregating to Rs. 2,476 made in 1932 and 1933. In 1937 the decree was assigned to the present respondent who took out execution for a sum of Rs. 11,156-5-5 on 23rd September, 1937. While this execution was pending, Madras Act IV of 1938 came into force and the first defendant applied for a stay of sale and filed the present application under S. 19 on 20th September, 1938. It is not disputed that the way in which the lower Court has treated this application is incorrect. The learned Judge has treated the decree as a compromise decree (which, so far as the first defendant is concerned, it was not) and has taken the principal of the decree as the principal of the debt, a procedure which, even on the footing of its being a compromise decree, could hardly be supported on the facts of this case.

It is contended for the appellant that both the payments made before the suit and the amount of Rs. 5,420 realised by the sale in 1930 must be regarded as open payments and that the interest outstanding on 1st October, 1937, must be wiped off without regard to these payments. The contention with reference to the payments before suit is that these were payments credited to a debt which carried compound interest, that there was no benefit to be derived by the creditor in adjusting these payments to interest rather than to principal and that on the basis of the decision in *Parr's Banking Co.* v. *Yates*[1], there is no presumption in such a case that the payments were first appropriated to interest. With reference to the sale

1. (1898) 2 Q.B. 460.

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amount credited to the decree at the time of the application for a personal decree, the contention is that though there may have been an appropriation towards the interest which had then accrued due on the amount decreed, there was no appropriation towards interest except to this extent and that at least the balance after deducting the accrued interest on the decree must be treated as an open payment.

We find ourselves unable to accept either of these contentions. The question is not whether the creditor can prove positively an appropriation of these amounts, towards interest, but whether the debtor is in a position to show that on 1st October, 1937, these amounts had not been adjusted in reduction of interest and consequently that interest was outstanding unrealised. In the case of the payments before the suit, they were certainly adjusted to the debt and a balance was struck and the suit claim proceeded on the footing of this balance with interest thereon. They cannot therefore be regarded as unadjusted payments. When once it is conceded that these payments have been adjusted towards the debt, they must have been adjusted in reduction of either interest or principal and the debtor not being in a position to show that they have been adjusted in reduction of the principal, it follows that to the extent of these payments he cannot show that there was on 1st October, 1937, interest outstanding. Similarly with reference to the payments made as a result of the sale after the decree, there is a demonstrable appropriation towards interest due under the decree. The balance of the payments has certainly been adjusted towards the decree debt which itself is made up of principal and interest. Thus with reference to this balance though the creditor is not able to prove that the money was appropriated towards the interest, the debtor is unable to prove that the payment was appropriated towards principal. He is therefore not in a position to show to the extent of this payment that interest was outstanding on 1st October, 1937. The two later payments made in 1932 and 1933 have not been shown to have been adjusted to the debt before the Act came into force. They cannot therefore be regarded as having reduced the amount of interest outstanding on 1st October, 1937. The position, therefore, is that on 1st October, 1937, there was a sum of Rs. 7,250, the principal of the debt and two payments aggregating Rs. 2,476 which had not been appro-

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priated and were available to go in reduction of the principal as on that date. The balance Rs. 4,774 will carry interest at the decree rate of six per cent. from 1st October, 1937.

The decree will be amended accordingly. As each party has succeeded to some extent, each party will bear his own costs in this Court. No separate orders are necessary on the memorandum of cross-objections.

K.S. *Order varied.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATARAMANA RAO.

Peri Kameswar Rao, minor by new guardian Peri Reddamma .. *Appellant** *(2nd Defendant)*

v.

Peri Jagannadha Sastri .. *Respondent (Plaintiff).*

Kameswar Rao v. Jagannadha Sastri.

Madras Hereditary Village Offices Act (III of 1895), Ss. 13 and 21—Suit for declaration that a claimant to a hereditary village office was not adopted by the predecessor—Cognizability by Civil Courts—If barred by S. 21 of the Act.

A suit for a declaration that the person put forward as the successor to a hereditary village office was not the adopted son of the previous holder of that office is not barred by S. 21 of the Madras Hereditary Village Offices Act and is cognizable by a Civil Court. The jurisdiction of a Civil Court is excluded by S. 21 only in those cases where a suit is cognizable by the Collector under S. 13 of the Act. The suit contemplated by S. 13 is only a suit for the recovery of a village office. The proviso to S. 13 (1) cannot be relied on for the purpose of enlarging the scope of S. 13 (1).

Appeal against the decree of the Court of the Subordinate Judge of Amalapuram in A. S. No. 44 of 1933 preferred against the decree of the Court of the District Munsif of Razole in O. S. No. 44 of 1933.

G. Lakshmanna and *G. Balaparameswari Rao* for Appellant.

P. C. Parthasarathi Aiyangar and *T. K. Subramania Pillai* for Respondent.

The Court delivered the following

JUDGMENT.—The question for decision in this second appeal is whether the suit out of which this appeal arises is barred by S. 21 of the Madras Hereditary Village Offices Act.

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* S A. No. 546 of 1937. 9th September, 1940.

Kameswar Rao v. Jagannadha Sastri.

The facts are few and not in dispute. The office of the Village Munsif of Peruru became vacant in 1928 consequent on the resignation of the first defendant. The second defendant was put forward as the adopted son of the first defendant, but the plaintiff's father opposed his claim on the ground that he was entitled to succeed thereto because the first defendant, the plaintiff's father and the natural father of the second defendant were brothers and sons of the same father. The revenue authorities referred the plaintiff's father to a Court of law. The plaintiff's father subsequently died and thereupon the plaintiff filed this suit for a declaration that the second defendant was not the adopted son of the first defendant. Both the Courts below have held that the suit is maintainable.

Mr. Lakshmanna on behalf of the second defendant (appellant) contends that under S. 21 of the Hereditary Village Offices Act the present suit is excluded from the cognizance of a Civil Court. The question is whether this contention is tenable. S. 21 of the Act runs thus:

"No Civil Court shall have authority to take into consideration or decide any claim to succeed to any of the offices specified in S. 3 or any question as to the rate or amount of the emoluments of any such office or except as provided in proviso (*ii*) to sub-S. (1) of S. 13, any claim to recover the emoluments of any such office."

It is settled by a uniform course of decisions of this Court that the jurisdiction of a Civil Court is excluded only in those cases where a suit is cognizable under S. 13 of the Hereditary Village Offices Act, which runs thus:

"Any person may sue before the Collector for any of the Village Offices specified in S. 3 or for recovery of the emoluments of any such office on the ground that he is entitled under sub-S. (2) or (3) of S. 10 of the Madras Proprietary Estates Village Service Act, 1894, or under sub-S. (2) or (3) of S. 10 or sub-S. (2) or (3) of S. 11 or S. 12 of this Act, as the case may be, to hold such office and enjoy such emoluments; or, being a minor, may sue before the Collector to be registered as heir of the last holder of any such office."

Giving S. 13 its plain meaning, the suit that is contemplated in S. 13 is only a suit for the recovery of a village office. But Mr. Lakshmanna lays stress on the proviso 'No suit shall be entertained for a mere declaratory decree' as implying that a suit for a declaration is cognizable only by the Revenue Court and that the plaintiff ought to have sued in the Revenue Court for a declaration that the second defendant was not the adopted son and also for recovery of the office. I have given due

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consideration to this argument and it seems to me that it is untenable. A suit for a declaration that a certain person is not the adopted son is primarily cognizable by a Civil Court and unless such a suit is expressly excluded by any provision of the Act or by necessary implication, it will lie. It is the right of every litigant, as observed by their Lordships of the Privy Council in *Sheo Singh Rai* v. *Dakho*[1] to come to the Court to have a document or an act which obstructs title or enjoyment of property cancelled or set aside or for an injunction against such obstructions, and such right would be sufficient to sustain a declaratory decree. So long as the question of adoption is left outstanding, it will be an impediment in the way of the plaintiff succeeding to the office. A suit such as this is maintainable in a Civil Court under S. 42 of the Specific Relief Act and the only relief which the plaintiff can claim in the suit and which the Court can grant is a declaratory decree because the consequential relief to which he may be entitled, namely, the recovery of the office, is not a relief which a Civil Court can grant. As their Lordships of the Privy Council again observed in *Strimathoo Moothoo Vijia Ragoonadah Ranee Kolandapuree Natchiar* v. *Dorasinga Tevar*[2], a suit for a declaration is cognizable where it is required as a step to relief in some other Court. Therefore if the plaintiff succeeds in establishing his right he will be enabled to file a suit under S. 13 of the Hereditary Village Offices Act and recover the office on the ground that he is entitled under sub-S. (2) of S. 10 of the Act to hold the office relying on the judgment which has removed all impediment to his succession. The proviso to S. 13 on which Mr. Lakshmanna relies does not warrant the contention put forward by him. S. 13 (1) of the Act is very plain and the proviso cannot be relied on for the purpose of enlarging the scope of S. 13 (1). It may be that in a suit for the recovery of the office the Revenue Court may incidentally go into the question of adoption, but it is not the province of the Revenue Court to grant a declaration as to status such as adoption. Where the enactment S. 13 (1) does not expressly or by necessary implication oust the jurisdiction of the Civil Court to entertain a suit of the nature in question, the proviso to the enactment cannot be relied on for the said purpose. The

1. (1878) L.R. 5 I.A. 87: I.L.R. 1 All. 688 at 705 (P.C.).
2. (1875) L.R. 2 I.A. 169: 15 Beng.L.R. 83 (P.C.).

proviso on the other hand expressly enacts that it is not the province of a Revenue Court to grant a declaratory decree. This necessarily implies that it is rather the province of a Civil Court to do so. The use of the expression 'mere' connotes that the Revenue Court is debarred from granting a substantive relief of the nature contemplated in S. 42 of the Specific Relief Act. It seems to me therefore that the view taken by the lower Courts is sound.

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In the result the second appeal fails and is dismissed with costs. I reduce the pleader's fee awarded by the lower Court from Rs. 50 to Rs. 25. The memorandum of cross-objections is dismissed, but I make no order as to costs. Leave to appeal refused.

K. S. *Appeal and cross-objections dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE HORWILL.

Katuri Dharmarao .. *Appellant** (*Plaintiff*)

v.

Manepalli Bapanayya and others .. *Respondents* (*Defendants 1 to 7 and nil*).

Dharmarao v. Bapanayya.

Hindu Law—Alienation by father—Son suing for partition and setting aside of alienation—At date of suit three more sons born to father—Whether the date of alienation or the date of suit to be taken in computing the share of the father in the joint family properties.

Where a joint family consisted of a father and his two sons at the time of the alienation in question and one of the sons sued for partition of the family properties in which he prayed for setting aside the alienation but at the actual time of the filing of the suit three more sons had been born to the father,

Held, that the alienee was entitled to the share of the vendor as at the date of the alienation.

Case-law reviewed and *Chinnu Pillai* v. *Kalimuthu Chetti*, (1911) 21 M. L.J. 246: I.L.R. 35 Mad. 47 (F.B.), followed.

Appeal against the decree of the District Court of Kistna at Masulipatam dated 30th September, 1936 and made in A. S. No. 43 of 1935 preferred against the decree of the Court of the Subordinate Judge of Bezwada in O. S. No. 92 of 1931.

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*S. A. No. 204 of 1937. 17th September, 1940.

Dharmarao v. Bapanayya.

P. Satyanarayana Rao for Appellant.

V. Parthasarathy and *S. Venugopala Rao* for Respondents.

The judgment of the Court was delivered by

Leach, C. J.

The Chief Justice.—The appellant was the plaintiff in a suit filed in the Court of the Subordinate Judge of Bezwada in which he asked for partition of the family properties and for possession of his share. He also asked the Court to set aside an alienation made by his father on the 10th September, 1921. The family estate then consisted of two house sites in the town of Bezwada, one site measuring 290 sq. yards and the other 720 sq. yards. On each site was a house built of mud and stone. The property alienated by the father was the first of these properties. At that time the joint family consisted of the father (the sixth respondent in this appeal) and his two sons (the appellant and his younger brother, the second respondent). Both the sons were then minors. Three other sons were born to the father between the years 1921 and 1931. They are the third, fourth and fifth respondents. The plaint contained the usual allegation that the father had lived a debauched life and that the property had been sold in order that he might indulge in his depraved habits. The Subordinate Judge rejected this plea and in a judgment in which he considered the evidence in detail he held that the alienation was binding on the sons. The appellant filed an appeal to the District Judge of Kistna. The District Judge disagreed with the finding of the Subordinate Judge that the alienation was binding on the sons. He considered that it had been proved that the father had lived an immoral life. He rejected the appeal, however, on the ground that the property alienated represented less than one-third of the estate and as the father was at the time of alienation entitled to a third share in the joint estate the alienation should not be set aside.

The appellant has now appealed to this Court. He contends that the District Judge should have held that the father was not entitled to more than one-sixth of the family property as three sons were born subsequent to the alienation. In support of this contention the appellant relies on the decision of the Full Bench of this Court in *Rangasami* v. *Krishnayyan*[1], ignoring entirely the subsequent Full Bench decision in *Chinnu Pillai* v.

1. (1891) 1 M.L.J. 603: I.L.R. 14 Mad. 408 (F.B.).

Dharmarao v. Bapanayya. Leach, C.J.

Kalimuthu Chetti[1] and the numerous decisions which regarded this case as settling the law. For the alienee, the first respondent, it has been contended that there was no justification for the finding of the District Judge that the father had lived an immoral life. The Court is asked to reverse the judgment of the District Judge on this point and restore that of the Subordinate Judge; but it is not open to the first respondent to raise this contention, because he has not printed the evidence. In these circumstances it does not lie in his mouth to say that there was no justification for the District Judge's conclusion. The Court is not in a position to investigate the question. The finding of the first appellate Court on a question of fact is binding here unless it can be shown that the finding is without foundation and without the evidence that cannot be shown.

The only real point in this appeal is whether the case is governed by *Rangasami* v. *Krishnayyan*[2] and a glance through the cases which have been decided by this Court since then shows that this Court has repudiated that decision and has held that the decision in *Chinnu Pillai* v. *Kalimuthu Chetti*[1] is to be regarded as settled law. In *Rangasami* v. *Krishnayyan*[2], a Full Bench, consisting of Collins, C.J., and Muthuswami Aiyar, Parker and Shephard, JJ., held that when a member of a joint family sells his share in the family property that share must be computed with reference to the state of the joint family at the date of the suit, not at the date of the alienation. If that decision were to be followed it is clear that it would mean that in this case the respondent would only be entitled to a one-sixth share in the estate, because at the date of the suit the family consisted of six members. The wisdom of the decision in *Rangasami* v. *Krishnayyan*[2] was doubted by Bashyam Aiyangar, J., in *Aiyyagari Venkataramayya* v. *Aiyyagari Ramayya*[3]. Bashyam Aiyangar, J., who relied on the decisions of the Privy Council in *Deendyal Lal* v. *Jugdeep Narain Singh*[4], *Suraj Bunsi Koer* v. *Sheo Proshad Singh*[5] and *Hurdey Narain Sahu* v. *Rooder Perkash Misser*[6], was of the opinion that the share should be computed from the date of the alienation and not from the date of the

1. (1911) 21 M.L.J. 246: I.L.R. 35 Mad. 47 (F.B.).
2. (1891) 1 M.L.J. 603: I.L.R. 14 Mad. 408 (F.B.).
3. (1902) I.L.R. 25 Mad. 690 (F.B.).
4. (1877) L.R. 4 I.A. 247: I.L.R. 3 Cal. 198 (P.C.).
5. (1879) L.R. 6 I.A. 88: I.L.R. 5 Cal. 148 (P.C.).
6. (1883) L.R. 11 I.A. 26: I.L.R. 10 Cal. 626 (P.C.).

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suit. This judgment led to the question being considered by a Full Bench of five Judges in *Chinnu Pillai* v. *Kalimuthu Chetty*[1]. The Bench consisted of White, C. J., and Benson, Munro, Sankaran Nair and Krishnaswami Aiyar, JJ. After the arguments had been closed Krishnaswami Aiyar, J., was appointed the Law Member of the Governor's Council. This appointment was made before judgment was delivered and the question was raised whether the Court, being then composed of only four members, was competent to deliver judgment. With a view to solving the difficulty the learned Chief Justice reconstituted the Bench, the only difference being the Hon'ble Mr. Krishnaswami Aiyar was not included. Counsel had nothing to add to the arguments which had previously been addressed to the Court and the four members who composed it thereupon proceeded to deliver judgment. They were of the opinion that under Hindu Law an alienee of the interest of a coparcener is entitled to enforce his claim against the family estate on the basis of the vendor's right at the time of the alienation. This meant that the decision in *Rangasami* v. *Krishnayyan*[2] was repudiated.

It is said by the learned counsel for the appellant in this case that as there are here two Full Bench decisions, each by a Court composed of four Judges, he is entitled to rely on the earlier decision, but this argument cannot be accepted because as I have already indicated this Court has held that the later decision settled the law, so far as this province is concerned. In *Baluswami Aiyar* v. *Lakshmana Aiyar*[3], the question was considered by Wallis, C. J., and Oldfield and Kumaraswami Sastri, JJ. The leading judgment was delivered by Kumaraswami Sastri, J., and in it the learned Chief Justice and Oldfield, J., concurred. After referring to *Rangasami* v. *Krishnayyan*[2] and *Chinnu Pillai* v. *Kalimuthu Chetti*[1], Kumaraswami Sastri, J., said:

"It may therefore be taken as settled that there is no fluctuation in the share to which the alienee is entitled and that his share will be the share of the vendor at the date of the alienation, subject of course to the equities in favour of the other members of the family against the transferor."

1. (1911) 21 M.L.J. 246: I.L.R. 35 Mad. 47 (F.B.).
2. (1891) 1 M.L.J. 603: I.L.R. 14 Mad. 408 (F.B.).
3. (1921) 41 M.L.J. 129: I.L.R. 44 Mad. 605 (F.B.).

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Other cases in which the same view has been taken are *Sivagnanam Servaigar* v. *Ramasami Chettiar*[1], *Ganesh Row* v. *Tulja Ram Row*[2], *Seetharam Naidu* v. *Balakrishna Naidu*[3], *Doraisami Sirumadan* v. *Nondisami Saluvan*[4], *Soundararajan* v. *Saravana Pillai*[5], *Subba Goundan* v. *Krishnamachari*[6], *Ramaswami Aiyar* v. *Venkatarama Aiyar*[7] and *Vasireddi Balachandrasekhara Varaprasad Bahadur* v. *Mallela Lakshminarasimham*[8].

The only dissentient note was struck in *Muthukumara Sthapathiar* v. *Sivanarayana Pillai*[9], which was decided by Jackson and Mockett, JJ. The decision given was in accord with *Chinnu Pillai* v. *Kalimuthu Chetti*[10], but Jackson, J., in the course of his judgment in which Mockett, J., concurred, indicated a strong preference for the decision in *Rangasami* v. *Krishnayyan*[11]. Inasmuch as *Chinnu Pillai* v. *Kalimuthu Chetti*[10], had in numerous judgments extending over a period of twenty years been accepted as settling the law, it is with great respect, difficult to understand the need for this further discussion. In view of what has gone before *Chinnu Pillai* v. *Kalimuthu Chetti*[10], must be followed and therefore the appellant's main contention must be rejected.

The only other question which the Court is called upon to consider is whether the District Judge was wrong in allocating the alienated property to the vendor's share. We agree with the District Judge that it represented less than what the father was entitled to as his share of the family property, at the date of the alienation. The land is less than one-third of the whole estate in area and the record shows that the house which stood upon it was of very little value. It has transpired in the course of the hearing that the first respondent as the owner of the site has built upon it a residence at a cost of some Rs. 20,000. This probably explains the origin of this suit.

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1. (1911) 22 M.L.J. 85.
2. (1913) 26 M.L.J. 460.
3. (1913) 26 M.L.J. 604.
4. (1912) 25 M.L.J. 405: I.L.R. 38 Mad. 118 (F.B.).
5. (1916) 30 M.L.J. 592.
6. (1921) 42 M.L.J. 372: I.L.R. 45 Mad. 449.
7. (1923) 45 M.L.J. 203: I.L.R. 46 Mad. 815.
8. (1940) 1 M.L.J. 820.
9. (1932) 64 M.L.J. 66: I.L.R. 56 Mad. 534.
10. (1911) 21 M.L.J. 246: I.L.R. 35 Mad. 47 (F.B.).
11. (1891) 1 M.L.J. 603: I.L.R. 14 Mad. 408 (F.B.).

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The appeal will be dismissed with costs in favour of the first respondent.

The first respondent has filed a memorandum of cross-objections as the District Judge has disallowed his costs in the District Court and in the trial Court. This cannot be justified and the costs will be allowed. The first respondent will get his costs here and in the two Courts below with costs on the memorandum of cross-objections.

K. C. *Appeal dismissed.*

Memorandum of Cross-Objections allowed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE LAKSHMANA RAO AND MR. JUSTICE HORWILL.

Boya Polamma .. *Accused.**

Polamma, *In re.*

Criminal Procedure Code (V of 1898), S. 341—Trial of accused for murder—Confession before Magistrate—Statement recorded—Inability of accused towards end of trial to understand proceedings—Whether accused could be convicted for murder—No miscarriage of justice.

Where the accused was charged with murder of a woman and she had confessed before the Sub-Magistrate her guilt and the confession was recorded by the Magistrate after all the ordinary precautions had been taken, and further the jewels on the body of the deceased were produced by the accused herself, there would be no miscarriage of justice in convicting her of murder under S. 302, Indian Penal Code, even if towards the end of the trial she should have impressed the Judge that she could not understand the proceedings.

Case referred for the orders of the High Court under S. 341 of the Code of Criminal Procedure by the Sessions Judge of Kurnool Division in his letter, dated 1st August, 1940.

Accused not represented.

The Public Prosecutor (V. L. Ethiraj) for the Crown.

The judgment of the Court was delivered by

Horwill, J.

Horwill, J.—Boya Polamma has been convicted by the Sessions Judge of Kurnool of the offence of murder, punishable under S. 302, Indian Penal Code, but as the Judge felt towards the end of the trial that she was unable to understand the proceedings, he has referred this case to us under S. 341, Criminal Procedure Code. It has since been reported that there is no likelihood of her hearing improving.

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* Cr. R. C. No. 561 of 1940. 25th October, 1940.
(Case Referred No. 25 of 1940).

There is no doubt in our minds that the learned Sessions Judge was right in convicting Boya Polamma of the offence with which she was charged. The prosecution story is that Boya Polamma was married to P. W. 8 and that just before this murder took place P. W. 8 took her and her children away to another village, and that he there renewed his intimacy with one Lakshmi, whom he was keeping as his concubine before he married Boya Polamma. She seems to have quarrelled with her husband for having resumed his relationship with Lakshmi in spite of his assurance that he would give up Lakshmi, and she came back with two of her children to the deceased Subbamma, who was her aunt. It was Subbamma who had arranged her marriage with P. W. 8 and it was apparently to her that the accused looked for comfort and sympathy. Subbamma, however, seems not to have given her the sympathy she expected and even refused to give her food; and the consequence, according to the prosecution, was that Boya Polamma murdered Subbamma by smashing her head with a large stone.

Only one witness (P. W. 5) claimed to have witnessed the murder, and her evidence has been rejected by the learned Sessions Judge. Apart from her evidence, however, there is very strong evidence against Boya Polamma. The most important of all is the confession (Ex. C) made to the Sub-Magistrate (P. W. 3). In the course of that statement she said:

"In the night I begged food and I slept at the house of Subbamma only. Being unable to put up with my misery and hardship I picked up a slab of stone and threw it on the head of Subbamma."

She also told the Magistrate about the jewels which she had taken from the body of Subbamma. In addition to this statement, there is reliable evidence that Boya Polamma took the police and certain panchayatdars to a rat hole in Subbamma's house and from it took out some jewels which undoubtedly were worn by Subbamma just prior to her death. The further evidence against Subbamma is that of P. Ws. 4 and 6. P. W. 5 is a daughter of Boya Polamma and P. W. 4 and P. W. 6 say that they saw Boya Polamma going away from Subbamma's house in the night with P. W. 5. On account of information about this offence, Boya Polamma was detained by P. W. 4 and handed over to the Village Munsif. From all this evidence we

Polamma, *In re.*

Horwill, J.

are satisfied beyond reasonable doubt that Boya Polamma was rightly convicted of the offence with which she was charged.

Her answers to the questions put to her by the Judge show that she understood the nature of the proceedings even in the Sessions Court. The learned Judge first asked her if she heard her statement in the committing Court, which had just been read out to her, and she replied that it was correct. She was then asked if she wished to say anything in answer to the prosecution evidence and she replied:

"My husband took away Rs. 5 from me. When I asked him for it, he and his concubine murdered Subbamma and foisted this case on me. I know nothing."

It was only after the accused was asked "P. W. 4 says he saw you the night Subbamma died. Do you wish to say anything?" that Polamma pleaded that she was unable to hear anything. The Judge thereupon desisted from asking her further questions. As is seen, she must have understood the proceedings up to then. She was represented by a vakil appointed by the Crown and she put forward the defence that this case was foisted on her. We are satisfied that no injustice has resulted from the fact that the Sessions Judge felt himself unable to question her further with regard to the evidence appearing against her. The magisterial confession, which was recorded after all the ordinary precautions had been taken, and the fact that she herself produced the jewels which were on the dead woman's body, satisfy us that there could have been no miscarriage of justice.

We therefore confirm the conviction by the learned Sessions Judge and under S. 341, Criminal Procedure Code, sentence Boya Polamma to transportation for life.

K. C. *Conviction confirmed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE KRISHNASWAMI AIYANGAR.

Rajamanickam Chetty *v.* Abdul Halim Sahib.

M. T. Rajamanickam Chetty and another .. *Appellants**

v.

T. R. Abdul Halim Sahib .. *Respondent.*

Transfer of Property Act (IV of 1882), S. 6 (e)—Suit for damages for wrongful dispossession of premises in breach of lease agreement—Assignment

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*L. P. A. No. 44 of 1939. 24th October, 1940.

Rajamanickam Chetty v. Abdul Halim Sahib

by sale of the 'profit and loss of the suit'—Death of plaintiff—Assignee if entitled to be brought on record and continue the suit.

Where after filing a suit for damages for wrongful dispossession of premises in breach of a lease agreement the plaintiff assigned by way of sale the profit and loss of the suit to X and died thereafter and X claimed the right to be brought on record and continue the suit,

Held, the right to recover damages whether for tort or contract is a mere right to sue and according to S. 6 (*e*) of the Transfer of Property Act cannot be transferred. The assignment of the fruits of a pending action though valid gives the assignee no right to interfere in proceedings in the action.

Subhadrayamma v. *Venkatapathi Raju*, (1924) 47 M.L.J. 93: L. R. 52 I. A. 1: I.L. R. 48 Mad. 230 (P.C.) followed.

Appeal under cl. 15 of the Letters Patent against the order of the Hon'ble Mr. Justice Wadsworth dated the 26th day of July, 1939, in Appeal against Order No. 314 of 1938 preferred against the order of the Court of the Subordinate Judge of Chingleput, dated the 30th day of June, 1938 and passed in M. P. No. 234 of 1937 in O. S. No. 17 of 1934.

N. Srinivasa Aiyangar for Appellants.

C. Padmanabha Aiyangar for Respondent.

The judgment of the Court was delivered by

Leach, C.J.

The Chief Justice.—The question involved in this appeal is whether the right to continue a suit filed in the Court of the Subordinate Judge of Chingleput has devolved upon the respondent. The suit was instituted by one T. S. Abdul Kuddus Sahib on the 9th March, 1934. The plaintiff asked for a decree for Rs. 15,000 as damages flowing from the wrongful termination of a lease in his favour and the entry upon the leased premises of the defendants, who are the appellants. The lease was dated the 9th September, 1930 and was for a term of three years which commenced on the 15th of that month. The premises leased consisted of a building which was being used as a cinema theatre. The agreement between the parties was that the lessors and the lessee should share equally in the rents of certain shops which were on the premises and the moneys derived from the letting of the theatre for entertainments. The plaintiff averred that the lessors resented the fact that he was entitled to half the rents of the property and as the result of this they entered upon the premises wrongfully and ousted him therefrom. He also averred that valuable articles left by him upon the premises had been removed and that other articles had been damaged. The sum of Rs. 15,000 was made up of profits which he claimed he had been deprived of as the result of the

Rajamanickam Chetty v. Abdul Halim Sahib.

Leach, C. J.

wrongful action of the appellants and the loss he had suffered as the result of the removal from the premises of articles belonging to him. The plaintiff's claim was based entirely on the alleged wrongful action of the appellants as the two concluding paragraphs of the plaint, Nos. 18 and 19, emphasize. They read as follows:

"18. The plaintiff claims an aggregate sum of Rs. 15,000 by way of damages against the defendants and pays a court-fee of the value of Rs. 937-7-0.

19. The cause of action for this suit arose at Conjeevaram within the jurisdiction of this Hon'ble Court on 9th March, 1931, the date when the defendants wrongfully dispossessed the plaintiff and subsequently *de die in diem* till 9th September, 1931, during which period the defendants wrongfully dispossessed the plaintiff in breach of the terms of the agreement."

On the 17th May, 1937, the plaintiff sold the whole of his assets to the respondent under a registered deed of sale. The sale deed has not been printed in full and it is said that the portion which has been printed has not been correctly translated. It is, however, common ground that the respondent bought "the profit and loss" of this suit and that the deed purported to confer upon him the right to conduct it. The plaintiff died five days later after its execution. The plaintiff's sister, his brother and the respondent each applied to the Court of the Subordinate Judge to be allowed to continue the suit. The sister and the brother each claimed the right as the legal representative of the deceased. The respondent claimed under the deed of sale of the 17th May, 1937. The Subordinate Judge dismissed the application of the sister and the brother, but granted that of the respondent. The defendants lessors then appealed to this Court. Their appeal was heard by Wadsworth, J., who concurred in the decision of the Subordinate Judge so far as it concerned the respondent. The sister and the brother did not contest the Subordinate Judge's finding that they were not entitled to be brought on record. This appeal is from the judgment of Wadsworth, J.

S. 6 (*e*) of the Transfer of Property Act says that a mere right to sue cannot be transferred; and it is accepted by the learned counsel that as the result of this provision there cannot be an assignment of a suit which has been filed for the purpose of recovering damages, either in contract or in tort. It is lawful, however, for a plaintiff in a pending suit to assign the benefit which he may obtain under the decree to be passed in the

suit; but this does not give the assignee of the fruits of the action the right to interfere in proceedings in the action—vide *Glegg* v. *Bromley*[1], which was accepted by the Privy Council as correctly stating the law in *Subhadrayamma* v. *Venkatapathi Raju*[2]. Therefore the right which the plaintiff purported to confer upon the respondent of conducting this suit was ineffective. All that the deed could confer upon him was the right to the fruits of the litigation.

Raja-manickam Chetty v. Abdul Halim Sahib.

Leach, C. J.

The Court has merely to consider the nature of the suit and as the plaint can only be read as embodying a claim for damages resulting from the alleged wrongful entry of the appellants upon the demised premises, the suit cannot be continued by the respondent.

For these reasons we allow the appeal with costs here and below.

K. S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

Chelikani Lakshmi Venkayamma .. *Petitioner* (Plaintiff)*

v.

Mandapati Venkatapathiraju and others.. *Respondents (Defendants).*

Madras Agriculturists' Relief Act (IV of 1938), S. 9—Mode of scaling down—Excess of interest received after calculation of interest at 5 per cent. per annum in scaling down—How to be dealt with.

Lakshmi Venkayamma v. Venkatapathiraju.

If in scaling down a debt under S. 9 of Act IV of 1938, it is found that the payments made towards interest are in excess of the amount of interest as scaled down, that excess amount will be retained by the creditor and will not be adjusted in reduction of principal. There is nothing contrary to general principles in allowing a creditor to retain that which has been willingly paid to him.

Muhammad Sahib v. *Kunthanmal Sowcar,* (1940) 2 M L.J. 185, approved.

Petition under S. 25 of Act IX of 1887 praying that the High Court will be pleased to revise the decree of the Court of the Subordinate Judge of Cocanada in S. C. S. No. 180 of 1938.

D. Narasaraju for Petitioner.

C. Rama Rao for Respondents.

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1. (1912) 3 K.B. 474.

2. (1924) 47 M.L.J. 93: L.R. 52 I.A. 1: I.L.R. 48 Mad. 230 (P.C.).

*C. R. P. No. 486 of 1939. 4th October, 1940.

Lakshmi Venkayamma v. Venkatapathiraju.

Wadsworth, J.

The judgment of the Court was delivered by

Wadsworth, J.—This Civil Revision Petition raises a question of the interpretation of S. 9 of Madras Act IV of 1938. The petitioner here was the plaintiff in the Court below. She sued on a promissory note for Rs. 600 dated 20th March, 1935, which carried interest at 15 per cent. per annum. The plaint alleged a series of payments totalling Rs. 165 towards interest and thereafter a payment of Rs. 212 towards interest and principal on 15th March, 1938. The lower Court assumed the truth of the assertion in the plaint that the payments were towards interest without recording any finding on the subject and concluded that the balance left over after crediting these payments towards the interest as scaled down under S. 9 (1) of the Act would be available in reduction of the principal amount. It is contended that this interpretation of the section is wrong.

S. 9 (1) stipulates that interest shall be calculated up to the commencement of the Act at the contract rate or at 5 per cent. whichever is less, that credit shall be given for all sums paid towards interest and that only such amount as is found outstanding, if any, for interest thus calculated shall be deemed payable together with the principal amount or such portion of it as is due. It is contended for the plaintiff who is the petitioner that the whole of the process laid down in this portion of S. 9 is a process in reduction of the debt for interest and that it does not contemplate any reduction of the amount due for principal. The process is firstly to calculate the interest which would have deen due at the rate of 5 per cent., then give credit for any payments actually made towards interest, then give a decree for interest on the basis of this calculation together with the amount due for principal. It is contended that if the scaling down process results in a smaller amount of interest than what has actually been paid as interest there is no provision in S. 9 for carrying over this excess interest in reduction of principal. On the other hand, it is contended for the respondent that the words "credit shall be given for all sums paid towards interest" must be read as if they were "credit shall be given in reduction of the debt for all sums paid towards interest" and that the final words "or such portion of it as is due" contemplate the reduction of principal by the process of carrying over the excess amount paid towards interest. It seems to us that the interpretation

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Wadsworth, J.

of the respondent involves not only the addition to the section of words which are not in it, but also entails the solution of an ambiguity by giving the benefit of the doubt to the expropriator, which, as we have frequently held, is not permissible in interpreting an act of this nature. The view for which the petitioner contends is in accordance with the plain language of the section. It is also the view adopted by Horwill, J., in *Muhammad Sahib* v. *Kunthammal Sowcar*[1] and we are of opinion that it is the correct view. It results in the conclusion that if the payments made towards interest are in excess of the amount of interest as scaled down, that excess amount will be retained by the creditor and will not be adjusted in reduction of principal; but there is nothing contrary to general principles in allowing a creditor to retain that which has been willingly paid to him.

It follows that a finding is necessary on the correctness of the averments of fact in the plaint regarding the nature of these payments totalling Rs. 165 alleged to have been made towards interest. It is pointed out for the respondent that the result of the finding of fact regarding the nature of these payments may be to enable him to put forward a plea of limitation based on the decision of the Privy Council in *Ram Shah* v. *Lal Chand*[2]. That is a matter which the lower Court will have to take into consideration.

In the result therefore the petition is allowed and the suit is remanded to the trial Court for fresh disposal in the light of this judgment. Parties will be permitted to adduce fresh evidence. Costs will abide the result.

K. S. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE KRISHNASWAMI AIYANGAR.

Gaffar Khan .. *Appellant** (*Defendant*)

v.

Syed Noor .. *Respondent* (*Plaintiff*).

Gaffar Khan v. Syed Noor.

Limitation Act (IX of 1908), Art. 62—Action for recovery of money stolen—Limitation.

Where a person has lost money by theft he can sue the thief for the recovery of the money quite apart from the crime but if he does, the suit

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1. (1940) 2 M.L.J 185.

2. (1940) 1 M.L.J. 895: L.R. 67 I.A. 160: I.L.R. (1940) Lah. 470 (P.C.).

*C.C.C.A. No. 36 of 1939. 17th October, 1940.

Gaffar Khan v. Syed Noor.

must be framed as one for money had and received, in which case it will be governed by Art. 62 of the Limitation Act which expressly relates to suits for money had and received.

Rama Seshayya v. *Sri Tripurasundari Cotton Press, Beswada*, (1925) 50 M. L.J. 520: I.L.R. 49 Mad. 468 (F.B.), distinguished.

Obiter: The English Law as to suspension of civil remedy until the felon has been convicted is not applicable in India as there is no distinction here between a misdemeanour and a felony.

Appeal against the decree of the City Civil Court at Madras, dated 21st March, 1939 and passed in O. S. No. 565 of 1937.

E. Duraiswami Aiyar and *E. D. Jayaraman* for Appellant.

Rafiuddin Ahmad for Respondent.

The judgment of the Court was delivered by

Leach, C.J.

The Chief Justice.—This appeal raises an interesting question of law relating to limitation. The appellant posed as a Doctor, but he had no qualifications. On the 25th February, 1934, the respondent had the misfortune to consult him and underwent an examination at the appellant's consulting room in Yunus Ali Street in Triplicane. He had with him at the time a wallet, containing Rs. 1,500 in currency notes. The wallet was in one of the pockets of the respondent's coat. For the purpose of the examination he had to take off the coat and he hung it up on a nail in the wall. The appellant took the opportunity to steal the wallet and the respondent did not discover the loss until the next day. When he did so he laid a complaint against the appellant. This led to the latter's arrest and conviction. The appellant was found guilty of the theft on the 24th July, 1934 and sentenced to a period of six months' imprisonment. On the 6th August, 1937, more than three years after the conviction the respondent instituted in the City Civil Court the suit out of which this appeal arises for the purpose of recovering from the appellant the Rs. 1,500 stolen from him and damages for being deprived of the use of the money. The appellant pleaded the Limitation Act, but his plea was rejected by the Principal Judge on the ground that the suit was one for the recovery of a debt and that the case came within the Full Bench decision of this Court in *Rama Seshayya* v. *Sri Tripurasundari Cotton Press, Beswada*[1].

1. (1925) 50 M.L.J. 520: I.L.R. 49 Mad. 468 (F.B.).

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Leach, C.J.

In the first place, the appellant says that in view of the wording of the plaint the suit must be treated as one for the recovery of compensation for a wrong done to the plaintiff. In the second place, he says that even if the plaint can be treated as embodying a claim for the recovery of a debt the case does not fall within the Full Bench decision (*Rama Seshayya* v. *Sri Tripurasundari Cotton Press, Beswada*[1]) and that the appropriate Article would be Art. 62, which would also mean that the suit was time barred. As so often happens the plaint is very loosely drawn, but the Court is prepared to assume that the claim set forth in the plaint is a claim on the debt and not a claim for the recovery of compensation, apart from a plea that the appellant should pay interest by way of damages on the money for the period during which the respondent was deprived of its use. The Principal Judge has rejected the respondent's claim for interest on the debt and has granted him a decree for merely Rs. 1,500 with costs. The respondent has not objected to the decision with regard to interest and therefore so far as this Court is concerned the suit is merely a suit for the recovery of Rs. 1,500. If the suit were to be regarded as a suit for damages it is common ground that it would be time barred.

In *Rama Seshayya* v. *Sri Tripurasundari Cotton Press, Beswada*[1], a shareholder sued a company for the recovery of a dividend which had not been paid to him. The Court had to consider which of four Articles of the Limitation Act applied, namely, Art. 62, 115, 116 or 120. The Court held that the Limitation Act does not contain an article applicable to a debt *simpliciter* and therefore the residuary Art. 120 was the only one applicable. Art. 62 prescribes a period of three years for a suit to recover money payable by the defendant to the plaintiff as money received by the defendant for the plaintiff's use; but the Court did not consider that this article applied to a suit by a shareholder to recover a dividend payable to him by the company. If Art. 62 does not apply in the present case, it is clear that Art. 120 must apply on the same parity of reasoning as is set forth in the judgment in *Rama Seshayya* v. *Sri Tripurasundari Cotton Press, Beswada*[1].

In the present case the trial Judge considered that it would not be possible where a person has stolen another person's money to regard the money as being money had and received

1. (1925) 50 M.L.J. 520: I.L.R. 49 Mad. 468 (F.B.).

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for the benefit of the victim, but the learned Judge did not consider the matter in the light of authority. A person who has suffered from the tortious act of another can always waive the tort and if money has been stolen from him he can sue for the recovery of the money on the basis that the money has been received to his use. This is a legal fiction, but it is a fiction which has found recognition for a great length of time. In *Neate* v. *Harding*[1], it was expressly held that it was open to a plaintiff to waive a tort and sue for money had and received. When the tort amounts to felony, the English law, however, requires the felon to be brought to justice before a civil suit is instituted, on the theory that the primary consideration is the vindication of the law. (See *Chowne* v. *Baylis*[2] and *Smith* v. *Selwyn*[3].) It is unnecessary for the Court to consider whether this rule should be applied in India, but it may be pointed out that there is nothing in the Limitation Act which suggests the application, that in this country there is no distinction between a misdemeanour and a felony, and that in England the rule does not apply when the tort is a mere misdemeanour. But we will assume for the purpose of this case that it does apply, because the appellant has been convicted and was convicted more than three years before suit.

It is beyond reasonable argument that where a person has lost money by theft he can sue the thief for the recovery of the money, quite apart from the crime, but if he does, the suit must be framed as one for money had and received, in which case it is governed by Art. 62, as this article expressly relates to suits for money had and received. Of course, if he likes he may sue for the recovery of damages by way of compensation, but here again the period of limitation will be three years, as both sides admit. As the respondent sued on the debt and as in the peculiar circumstances the suit must be regarded as a suit for money had and received it does not fall within *Rama Seshayya* v. *Sri Tripurasundari Cotton Press, Beswada*[4] but within Art. 62, and therefore is clearly time barred.

The appeal will be allowed with costs in the trial Court; but in this Court each party will bear his own costs, the appellant

1. (1851) 6 Ex. 349: 20 L.J. Ex. 250.
2. 31 L.J. Ch. 757.
3. (1914) 3 K.B. 98.
4. (1925) 50 M.L.J. 520: I.L.R. 49 Mad. 468 (F.B.).

having succeeded on the law point, but having failed on the contention that there was no theft.

Gaffar Khan *v.* Syed Noor.

Leach, C J.

K. S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

Manikka N. Perumal Aiyar .. *Petitioner** (*Petitioner-Plaintiff*)

v.

Srinivasa Aiyangar .. *Respondent* (*Respondent-Defendant*).

Perumal Aiyar *v.* Srinivasa Aiyangar.

Civil Procedure Code (*V of 1908*), *O. 33, rr. 5 and 7—Application to sue* in forma pauperis—*Plea of* res judicata *raised by defendant—Court looking into evidence—Dismissal of application as disclosing no cause of action—Propriety—Interference in revision.*

Where the lower Court held on looking into the counter-affidavit filed by the defendant and certain other documents produced by him that the suit was barred by *res judicata* and consequently dismissed the plaintiff's application for leave to sue *in forma pauperis* under O. 33, r. 7 (*d*), Civil Procedure Code, on the ground that the plaint did not disclose any cause of action,

Held, that the lower Court acted wrongly in looking into the evidence in the case at that stage, and that as the application itself did not disclose any want of cause of action the Court should have granted leave to the applicant.

Held, further, that as the application had been rejected on a ground not contained in O. 33, r. 5 of the Code the lower Court acted without jurisdiction, and its order was liable to be set aside by the High Court in revision.

Petition under S. 115 of Act V of 1908 praying that the High Court will be pleased to revise the order of the Court of the District Munsif of Manamadura dated 14th August, 1937 and made in O. P. No. 35 of 1936.

K. Vythinathan for Petitioner.

S. Krishnaswami Aiyangar and *R. Kesava Aiyangar* for Respondent.

The Court delivered the following

JUDGMENT.—This is a revision petition against the order of the District Munsif of Manamadura dismissing an application for leave to sue *in forma pauperis* on the ground that the application did not disclose any cause of action.

It is conceded that the application itself did disclose a cause of action; but the learned District Munsif, after seeing the counter of the defendant and looking into certain documents

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*C. R. P. No. 1652 of 1937. 20th September, 1940.

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produced by him, held that the suit was barred by *res judicata.* The question that arises in this petition is whether the Court was right in considering the counter and documents and dismissing the application on that account. A further point arises whether, even if he ought not to have done so, this Court can entertain a revision petition on the ground that there was an act without jurisdiction.

O. 33, r. 5, Civil Procedure Code, says that the Court shall reject an application for permission to sue as a pauper if any one of five conditions is fulfilled. The condition with which we are here concerned is set out in sub-r. (*d*), "where his allegations do not show a cause of action." R. 6 says that where the Court sees no reasons to reject the application on any of the grounds stated in r. 5 it should fix a day for receiving evidence in proof of pauperism and for hearing any evidence adduced in disproof thereof. R. 7 (2) says that (on the day of hearing after notice) the Court shall also hear any argument which the parties may desire to offer on the question whether on the face of the application and of the evidence (if any) taken by the Court as herein provided, the applicant is or is not subject to any of the prohibitions specified in r. 5. R. 7 thus makes it clear that although the Court may admit an application, it is still open to it, after hearing the other side, to reject the application on any of the grounds set out in sub-rr. (*a*) to (*e*). With regard to sub-rr. (*a*), (*b*), (*c*) and (*e*), evidence may be necessary before it is possible to decide whether the application should be rejected or not, but it is difficult to see how evidence can help the Court with regard to sub-r. (*d*); for the application can only be rejected on ground (*d*) if the allegations in the application itself do not show a cause of action. For deciding whether the application should be rejected on that ground, arguments of the other side may be very helpful but hardly the evidence. One can however envisage cases in which something is said in the application which suggests, although not very directly, that there may not be a cause of action. In such cases it is perhaps arguable, although I should be very reluctant to accede to the argument, that the Court may look into the counter and have regard to evidence in order to clarify what is already in the application. But in the present case there is admittedly nothing in the application which even suggests that there is no cause of action. The learned Munsif thought that

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the plaintiff was playing a fraud on the Court in not mentioning the previous litigation which would operate as *res judicata*; but I do not think that the plaintiff is bound to set out in the plaint defences that may be open to the defendant. Even if he ought to have done so, this omission to do so would not make his application liable to be dismissed under O. 33, r. 5 (*d*). *Sourendra Nath* v. *Jatindra Nath*[1] has been relied on by the learned Advocate for the respondent in support of the lower Court's order; but I do not find in it anything which helps the respondent.

The other question is whether this Court should interfere in revision. O. 33, r. 5 gives five grounds upon which an application for permission to sue *in forma pauperis* can be rejected. If a Court rejects it on some other ground not set out in O. 33, r. 5, that Court acts without jurisdiction and this Court has therefore jurisdiction to interfere in revision. The learned advocate for the respondent relies on a decision of Beasley, C. J., *Subbayyar* v. *Vallappan Ambalam*[2]. In that case, there was something in the application to sue *in forma pauperis* which indicated that the suit might be barred by *res judicata*, and the lower Court admitted certain evidence which threw further light on this reference to earlier litigation in the application. The learned Chief Justice, while finding that the lower Court ought not to have gone into such an enquiry, thought that its doing so was not an act in excess of its jurisdiction. That was a case such as I referred to in the last paragraph, in which there were grounds set out in the application which afforded a basis for the lower Court's order and where it might be said that the enquiry helped to elucidate something that was set out in the application. Where, however, there is nothing in the application which suggests that the Court has no jurisdiction, then clearly the Court cannot reject the application on the ground that 'his allegations do not show a cause of action.' Sundaram Chetty, J., says in *Ramachandra Raju* v. *Venkiah*[3]:

> "The non-existence of the cause of action should appear clearly on the face of the application itself and the Court acts without jurisdiction in travelling beyond the four corners of the application."

The learned Chief Justice in the Full Bench decision of this Court in *Rathnam Pillai* v. *Pappa Pillai*[4] says with regard

1. A.I.R. 1925 Cal. 990.
2. (1937) M.W.N. 415.
3. (1926) 52 M.L.J. 330.
4. (1902) 13 M.L.J. 292 (F.B.)

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to the old Act which contained the same provisions:

"I consider the Munsif acted illegally in allowing evidence to be put in on behalf of the defendant with reference to the merits of the claim of the party applying for leave to sue *in forma pauperis* and in dismissing the application on the ground that on the evidence on record the applicant had no subsisting cause of action."

That decision was given in a revision petition and the order of the lower Court seems to have been set aside.

This petition is therefore allowed with costs in this Court and the application is restored to file and remitted to the lower Court for disposal according to law.

B.V.V. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE BURN AND MR. JUSTICE MOCKETT.

The Public Prosecutor .. *Petitioner**

v.

S. Venkatasubramanyam .. *Respondent (Accused).*

Public Prosecutor v. Venkatasubramanyam.

Madras Children Act (IV of 1920), Ss. 3 and 22—Conviction for murder—Accused under 16 at date of offence and over 16 at time of conviction—Proper sentence.

Where an accused who was convicted for murder though under 16 years of age at the time of the commission of the offence was over 16 years at the time of the conviction he cannot be called a 'young person', and S. 22 of Act IV of 1920 does not impose any bar against sentencing him to death or transportation. It is the time of the conviction and not the time of the commission of the offence that is important.

Youth alone is not a reason for mitigating punishment but as the offender was below 18 years, a sentence of transportation for life was proper.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying that the High Court will be pleased to revise the order of the Court of Session of the Chittoor Division dated 17th July, 1940 and passed in Sessions Case No. 14 of 1940.

Petitioner in person.

C. K. Venkatanarasimhan for Respondent.

The judgment of the Court was delivered by

Burn, J.

Burn, J.—The learned Public Prosecutor has brought up in revision the order passed by the learned Sessions Judge of Chittoor in S. C. No. 14 of 1940. In that case the accused

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*Crl. R. C. No. 799 of 1940. (Crl. R. P. No. 753 of 1940). 18th November, 1940.

Public Prosecutor v. Venkatasubramanyam.

Burn, J.

Venkatasubramanyam was charged with abetment of murder (Ss. 302 and 114 of the Indian Penal Code). The assessors unanimously expressed the opinion that he was guilty and the learned Sessions Judge found him guilty under Ss. 302 and 114 but the learned Judge, instead of passing any sentence upon the accused, has reported the case to Government for orders under S. 27 of the Madras Children Act (IV of 1920). Pending the orders of the Government the learned Judge has ordered the accused to be detained in the Senior Certified School at Chingleput.

The order of the learned Sessions Judge is based upon the fact that the accused was under 16 years on the 8th of February, 1940, when this dreadful crime, as the learned Judge properly calls it, was committed. The learned Judge says that the accused was a 'young person' as defined in S. 3 of the Madras Children Act (IV of 1920) and therefore he cannot be sentenced to death or transportation for life—*vide* S. 22 of the same Act. The learned Judge has however failed to notice that the point of time that is material in considering whether an offender is a 'young person' or not is the time at which the sentence is to be pronounced, S. 22 says:

"Notwithstanding anything to the contrary contained in any law, no child or young person shall be sentenced to death, transportation or imprisonment............."

Now, on the 17th of July, 1940, when the learned Sessions Judge had concluded this trial and was in a position to pass sentence, the accused in this case was no longer a 'young person.' The learned Judge's finding is that the accused may be taken to have been born on the 10th of June, 1924. The learned Judge has pointed out that there has been some alteration of the final figure in the Sanskrit College Register, which he treated as evidence for purposes of the case, but even if the figure is properly recorded as 1924, it is clear that the accused was over 16 at the time of the trial of the case. He was not therefore a 'young person' and S. 22 did not impose any bar against sentencing him to death or transportation. This is made clear by a reference to the definition of 'youthful offender' in S. 3 of the Act. It is there stated that a 'youthful offender' means any person who has been convicted of an offence punishable with transportation or imprisonment and who at the time of such conviction was under the age of sixteen years. It is

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Burn, J.

therefore the time of the conviction and not the time of the commission of the offence that is important.

The order of the learned Judge must therefore be set aside. In considering the sentence that ought to be passed in this case we are obliged to note that the crime was a peculiarly despicable one. The person murdered was a very old and infirm lady and she was murdered for the sake of her valuable gold chain that she was wearing round her neck and a ring that she wore on her hand. She was murdered by strangulation, the actual strangling being done by one Raghavalu at the instigation of the accused, Venkatasubramanyam. Why Raghavalu was tendered a pardon and thereby enabled to get off scot-free we do not know. Learned counsel for the respondent in this case has pointed out the great disparity in fortune between Raghavalu and the respondent. Raghavalu who did the actual murder gets off wholly free. The respondent who conceived and instigated the murder but did not commit it is in danger of being hanged. That however by itself is not of course a reason for mitigating the punishment of this respondent. We have frequently stated that youth alone is not a reason for mitigating punishment in murder cases, but those cases have usually been cases of offenders above the age of 18. It is very rarely that young murderers under 18 are sentenced to death. We shall therefore sentence the respondent in this case to transportation for life. It is not a case in which we are able to make any recommendation on his behalf to the Provincial Government.

K. S. *Order set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

Jampa Sattiraju and others .. *Petitioners** (*Petitioners*)

v.

Kallepara Venkatasatyam and others. *Respondents* (*Respondents 2 to 5*).

Sattiraju v. Venkatasatyam.

Madras Agriculturists' Relief Act (IV of 1938), S. 3 (3)—Debt—Meaning of—Advances made by partner to firm—Partners agriculturists—Right to have advance scaled down—Advance whether constitutes debt.

An advance made by one partner to the partnership does not entail a liability by the partners to repay that advance but rather a mere right in

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* C. R. P. No. 1335 of 1938. 16th August 1940.

Sattiraju v. Venkatasatyam.

equity to have a claim on the assets to the extent of the advance at the time of the dissolution of the partnership. Consequently, such an advance cannot be scaled down as a debt where the partners of the firm are shown to be agriculturists within the meaning of the Madras Agriculturists' Relief Act.

There is no reason to suppose that "debt" in S. 3 (3) of the Act is meant to include, contrary to usage, an unascertained amount; "liability" in that clause means a legal liability, a liability enforceable at law.

Petition under Ss. 115 of Act V of 1908 and 224 of the Government of India Act, 1935, praying that the High Court will be pleased to revise the order of the Court of the District Munsif of Narasapur in C.M.P. No. 740 of 1938 in O. S. No. 215 of 1931.

P. Satyanarayana Rao and *S. Venugopala Rao* for Petitioners.

T. Satyanarayana for Respondents.

The Court delivered the following

JUDGMENT.—The plaintiffs and the defendants were partners and had advanced various sums of money to the partnership. The plaintiffs filed the present suit for accounts, and after the preliminary decree had been passed and the matter was in the hands of the Commissioner, who was directed to take accounts, the defendants filed an application asking the Court to direct the Commissioner to work out the individual debts of the partners in accordance with the provisions of the Madras Agriculturists' Relief Act. The petition was dismissed on the ground that although all the partners were agriculturists, the Act could not apply to a partnership or to money advanced by partners to their business.

The defendants' case, as put in this Court, is that from the very inception, these debts were debts within the meaning of S. 3 (3) of the Act. It seems to me that this argument cannot be accepted. When the money was advanced, it was advanced to the partnership and although a partnership has no corporate existence, yet one can speak of partnership assets and these advances were intended to be assets of the partnership. The right of the partners to recover these advances could only arise upon a dissolution of the partnership. No obligation arose, at the time the advances to the partnership were made, to return upon demand or otherwise the money so advanced. A debt implies a legal liability to repay; and while the partnership was in being, there was no legal liability on the other partners to repay the advances made to the partnership. The only way in

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which the advance could be recovered was by the equitable action of the Court at the time of the dissolution of the partnership. Even then, there is no obligation to one partner by the other partners with regard to individual advances. The partner who made the advance has merely an equitable right to have the advance repaid out of the assets of the partnership.

A further difficulty that arises in accepting the contention of the learned advocate for the petitioners is that until the Court passed a final decree—or at any rate had passed orders after receiving the Commissioner's report and hearing objections thereon—it was impossible to know what amount should be paid to the various partners. Until all the disputes arising between the partners had been considered and adjudicated upon by the Court, there could have been no debt and therefore nothing to which the Act could be applied. Until the final decree was passed, there was no debt by one partner to another.

Wood v. *Scoles*[1] has been quoted to show that loans to a partnership stand on a different footing from capital advances by the partners. That may be so; but in that particular case, the distinction between loan and capital was to be found in the agreement between the partners at the time the partnership came into existence. Such an agreement would be enforced by the Court when the assets were distributed upon dissolution. I find nothing in that case to suggest that there was any legal liability on one partner to another to repay these advances. In *Doraisami Padayachi* v. *Vaithilinga Padayachi*[2], a Full Bench of this Court was called upon to consider whether a promise by a partner to pay what was due on accounts on winding up was a promise to pay a debt which would operate to save limitation. The learned Judges felt themselves called upon to define the word 'debt'. They say:

"We think the word 'debt' . . . . . must be taken to have been used in its ordinary meaning of a sum payable in respect of a money demand recoverable by action."

An opinion was expressed by Sir John Wallis, C. J., that a debt has always meant an ascertained amount.

It is argued that the word 'debt', as defined in the Madras Agriculturists' Relief Act, has a wider meaning than that ordinarily given to it. "Debt" is defined in the Act as "any

1. (1866) 1 Ch. App. 369.
2. (1916) 32 M.L.J. 422: I.L.R. 40 Mad. 31 (F.B.).

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liability in cash or kind whether secured or unsecured, due from an agriculturist. . . . . ." There is no reason to suppose that debt is meant to include, contrary to the ordinary usage, an unascertained amount. However that may be, it is quite clear from this definition that it is a liability, and 'liability' must mean a legal liability, a liability enforceable at law. An advance made by a partner to the partnership does not entail a liability by the partners to repay that advance, but rather, as I have already pointed out, a mere right in equity to have a claim on the assets to the extent of the advance at the time of the dissolution of the partnership. *Muthammal* v. *Sivakami Ammal*[1], has been referred to to show that the word 'liability' is not always given the meaning that I have given to it above, but the question that arose there was whether a son is liable to pay what his deceased father would have had to pay by way of mesne profits. In considering that point, the learned Judges were not concerned with the definition of the English word 'liability', which is a word that has acquired a technical meaning, but rather to ascertain whether the ancient texts required the son under the circumstances to pay mesne profits. I do not find anything in that judgment which has any material bearing on the point at issue in the present case. I need not discuss *Mathu* v. *Achu*[2], in which there was a transfer of an actionable claim; and in which it was held that there can be a debt even though some calculation may be necessary to ascertain how much it is.

In the result, this petition fails and is dismissed with costs.

B. V. V. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

S. Ramasubbier and another ... *Appellants* (Respondents-Plaintiffs)*

v.

P. Rama Aiyar and others ... *Respondents (Petitioners-Defendants).*

Ramasubbier v. Rama Aiyar.

Madras Agriculturists' Relief Act (IV of 1938), S. 8, Explanation—Scope.

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1. (1925) 21 L.W. 606.
2. (1934) 67 M.L.J. 158: I.L.R. 57 Mad. 1074.

* A.A.O. Nos. 101 and 160 of 1940. 4th November, 1940.

Rama-subbier v. Rama Aiyar.

On 14th August, 1922, one P and his sons R and V executed a promissory note for Rs. 7,000 in favour of S on whose death his two sons X and Y divided the debt between them and in pursuance thereof, the debtors R and V executed on 19th August, 1925, two promissory notes one to X for Rs. 4,900 and another to Y for Rs. 2,600. On 13th August, 1928, R and V and the other two sons of P who had not joined in the execution of the earlier pronotes executed two pronotes for Rs. 5,400 and Rs. 2,200 to X and Y respectively in renewal of the two promissory notes of 1925. In June, 1931, V separated himself from his brothers, and the other three brothers who continued joint, executed promissory notes for Rs. 5,963 and Rs. 2,425 respectively in settlement of the debts due under the notes of 1928. X and Y obtained decrees on 16th September, 1933 and 6th February, 1933, on their respective promissory notes. The lower Court scaled down the decrees with reference to the principal sum of the promissory note of 14th August, 1922, apportioning the amount scaled down between the two decree-holders in the ratio of Rs. 4,900 to 2,600. On appeals by the decree-holders,

Held, (1) that the various notes were executed on behalf of the joint family of P and his sons, and the debtors were substantially the same being the joint family. *Doraikannu Odayar* v. *Veerasami Padayachi*, (1940) 2 M.L.J. 651, followed;

(2) that the creditor in respect of each set of promissory notes executed subsequent to the partition in the creditor's family is the same, namely, X and Y respectively. The debt due under each of these decrees can be traced back through successive renewals to the two pronotes of 19th August, 1925;

(3) the earliest note of 14th August, 1922, having been executed to S the father, and the debt having been split up at the subsequent partition between X and Y the debt cannot be said to be renewed or included in a fresh document within the meaning of the Explanation to S. 8, although the sums for which the later pronotes were executed were equal in the aggregate to the original debt. The scaling down process will therefore have to stop with and not go beyond the two promissory notes in favour of X and Y respectively of 19th August, 1925.

Appeals against the order of the Court of the Subordinate Judge of Tinnevelly dated 31st October, 1939 and made in I.A. No. 158 of 1938 in O. S. No. 49 of 1933 and I. A. No. 307 of 1939 (I. A. No. 735 of 1938 in O. S. No. 739 of 1932, District Munsif's Court, Tinnevelly) respectively.

T. M. Ramaswami Aiyar for Appellants.

B. C. Seshachala Aiyar for Respondents.

The judgment of the Court was delivered by

Patanjali Sastri, J.

Patanjali Sastri, J.—These are appeals preferred by decree-holders against orders scaling down their decrees under S. 19 of Madras Act IV of 1938. The debts which had ripened into these decrees had their origin in a promissory note for Rs. 7,000 executed by one Pichumani Aiyar and two of his sons Rama Aiyar and Venkatachalam Aiyar on 14th August, 1922, in favour of Srinivasa Aiyar, the father of these decree-

Rama-subbier v. Rama Aiyar. Patanjali Sastri, J.

holders. After Srinivasa Aiyar died, there was a partition between the two sons on 15th May, 1925, at which the debt was divided between them and in pursuance of the division the debtors Rama Aiyar and Venkatachalam Aiyar executed on 19th August, 1925, a promissory note for Rs. 4,900 to the appellant in C. M. A. No. 101 and another promissory note for Rs. 2,600 to the appellant in C. M. A. No. 160, their father having died in the meantime. On 13th August, 1928, Rama Aiyar and Venkatachalam Aiyar and the other two sons of Pichumani Aiyar who did join in the execution of the earlier notes executed two promissory notes for Rs. 5,400 and Rs. 2,200 respectively in discharge of the prior notes for Rs. 4,900 and Rs. 2,600 referred to above. In June, 1931, Venkatachalam Aiyar separated himself from his brothers by executing a release deed and on 5th of August, 1931, the other three brothers who continued joint executed promissory notes for Rs. 5,963 and Rs. 2,425 respectively in settlement of the debts due under the notes of 1928. The appellant in C. M. A. No. 101 brought O. S. No. 49 of 1933 for recovery of the amount due under his promissory note and obtained a decree on 16th September, 1933 and the appellant in C. M. A. No. 160 sued in O. S. No. 739 of 1932 for the amount due to him and obtained a decree on 6th February, 1933. These decrees have been scaled down by the Court below with reference to the principal sum advanced under the original promissory note of 14th of August, 1922, and the question for consideration in these appeals is whether in the circumstances mentioned above, the debt can be said at each stage to have been renewed or included in a fresh document in favour of the same creditor within the meaning of the explanation to S. 8 of the Act.

We have already held in *Doraikannu Odayar* v. *Veerasami Padayachi*[1], that when a member of a joint family executes a fresh document for a pre-existing liability binding on the family but incurred on its behalf by another member, such previous debt can be regarded as renewed or included in a fresh document within the meaning of the explanation, as the debtor in each case is the same person, namely, the joint family. It is not disputed in this case that the various promissory notes were executed on behalf of the joint family of Pichumani Aiyar and

1. (1940) 2 M.L.J. 651.

Rama-subbier v. Rama Aiyar.

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his sons. It follows, therefore, that so far as the debtors under the various promissory notes are concerned, they are substantially the same. The question next arises whether the creditor or creditors under the successive promissory notes can also be said to be the same. Here again, it will be seen from the facts mentioned above that the creditor in respect of each set of promissory notes executed subsequent to the partition in the creditors' family is the same, namely, the appellant in each of these appeals. The debt due under each of these decrees can thus be traced back, through successive 'renewals' to the promissory notes executed on the 19th of August, 1925.

Learned Counsel for the respondent would, also, have us go further back to the first promissory note of the 14th of August, 1922 and take the sum of Rs. 7,000, advanced thereunder as the principal sum for purposes of scaling down the decrees under S. 8. We are, however, unable to do so. As stated already, the earliest note was executed in favour of Srinivasa Aiyar, the father, and at the partition that took place after his death, the debt was split up into two unequal parts and the appellant in each of these appeals got the debtors to execute a separate promissory note for the portion of the debt allotted to him and these notes have been renewed subsequently from time to time. It has been argued that in view of the definition of 'creditor' as including "his heirs, legal representatives and assigns," the promissory notes taken by the sons of Srinivasa Aiyar though for distinct portions of the debt due under the original note executed in his favour must be regarded as a renewal of that debt or at all events as its inclusion in fresh documents. But it seems to us that the explanation to S. 8 requires that the debt must continue in substance to be the same though the amount and the parties under the various documents given as vouchers for it need not be strictly identical. This requirement cannot be regarded as satisfied when the debt is divided among the heirs of the creditor and the debtor executes a separate instrument for a part of the debt in favour of each of such heirs. We are therefore of opinion that the promissory notes executed by the debtors separately in favour of the two sons of Srinivasa Aiyar for portions of the original debt allotted to them at the partition cannot be said to represent a renewal of the original debt or its inclusion in fresh documents within the meaning of the explanation, although the sums for which such promissory

notes were given equal in the aggregate to the amount of the original debt.

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It follows that the decree in each case must be scaled down with reference to the amount of the promissory note executed in favour of each of the appellants on the 19th of August, 1925. The order of the Court below is set aside and the applications are remitted to the lower Court for disposal in the light of this judgment. As the appeals have not fully succeeded, we direct the parties in each case to bear their own costs.

K. S. *Orders varied.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE LAKSHMANA RAO.

Thoonga Vedan *alias* Chinnama Naicken and others .. *Petitioners**

v.

Perumal Goundan and others .. *Respondents.*

Thoonga Vedan v. Perumal Goundan.

Criminal Procedure Code (V of 1898), S. 147—No order for costs in decision under—Subsequent order awarding costs—Sustainability.

Where there is no order as to costs in the decision under S. 147 of the Criminal Procedure Code a subsequent order awarding costs is unsustainable.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying that the High Court will be pleased to revise the order of the Court of the Sub-Divisional Magistrate of Namakkal dated 20th March, 1940 and passed in M. C. No. 56 of 1939.

V. T. Rangaswami Aiyangar and *T. R. Ramachandran* for Petitioners.

K. S. Jayarama Aiyar and *S. Arunachalam* for Respondents.

A. S. Sivakaminathan for *The Public Prosecutor* for the Crown.

The Court made the following

ORDER.—There was no order as to costs in the decision under S. 147 of the Code of Criminal Procedure and the award of costs by a subsequent order cannot be supported. The Revision Petition is therefore allowed and the order as to costs is set aside.

K. S. *Petition allowed.*

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*Crl. R. C. No. 257 of 1940. (Crl. R. P. No. 246 of 1940). 29th October, 1940.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE LAKSHMANA RAO.

The Public Prosecutor .. *Appellant**

v.

Kanholi Kunhiraman Nayar .. *Respondent (Accused).*

Public Prosecutor *v.* Kunhiraman Nayar.

Indian Post Office Act (VI of 1898), Ss. 52 and 53—Offence under—Prosecution for—Sanction of postal authorities—If essential to confer jurisdiction on Court—Acts constituting also the minor offence under S. 53—Effect.

A postman was charged with an offence under S. 52 of the Indian Post Office Act for secreting two letters in course of transmission by post and he was committed for trial by the Court of Session. On a preliminary objection,

Held, the offence under S. 52 of the Post Office Act can be taken cognizance of without a complaint by the Director-General of Posts and Telegraphs or the Postmaster-General and therefore the commitment was legal. That the acts also constitute the minor offence under S. 53 of the Act is no bar to the trial for the offence under S. 52.

Appeal under S. 417 of the Code of Criminal Procedure, 1898, against the acquittal of the aforesaid respondent (accused) by the Assistant Sessions Judge of Ottappalam of the Court of Session, South Malabar Division in S. C. No. 44 of 1940 on his file.

N. Somasundaram for Appellant.

K. S. Sundaram for Respondent.

The Court delivered the following

JUDGMENT.—The respondent a postman was charged by the police with an offence under S. 52 of the Indian Post Office Act for secreting two postal articles in course of transmission by post and he was committed for trial by the Court of Session of that offence. There was no complaint by order of or authority from the Director-General or Postmaster-General, and a preliminary objection was taken to the trial on the ground that the acts also constitute the minor offence under S. 53 of the Indian Post Office Act of detaining the postal articles, which according to S. 72 of the Indian Post Office Act cannot be taken cognizance of unless upon complaint made by order of or authority from the Director-General or Postmaster-General. The objection was upheld and the respondent was acquitted.

Hence this appeal by the Provincial Government that the order of acquittal cannot be supported. The offence under S. 52 of the Indian Post Office Act can be taken cognizance of

*Crl. A. No. 716 of 1940. 3rd December, 1940.

without any complaint, and the commitment was legal. That the acts also constitute the minor offence under S. 53 of the Indian Post Office Act is no bar to the trial of the offence under S. 52 of the Indian Post Office Act and the respondent ought to have been tried for that offence. The order of acquittal is therefore set aside and the respondent will be tried in accordance with law.

Public Prosecutor v. Kunhiraman Nayar.

K. S. *Order set aside.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, MR. JUSTICE PANDRANG ROW, MR. JUSTICE ABDUR RAHMAN, MR. JUSTICE KRISHNASWAMI AIYANGAR AND MR. JUSTICE PATANJALI SASTRI.

Thondam Annamalai Mudali .. *Appellant** (*Plaintiff*)

v.

Tiruttani Ramasami Mudali and others .. *Respondents* (*Defendants*).

F.B. Annamalai Mudali v. Ramasami Mudali.

Civil Procedure Code (V of 1908), S. 47—Scope and applicability—Suit by stranger auction-purchaser against judgment-debtor for delivery of possession—If barred by S. 47, Civil Procedure Code—Auction-purchaser whether "representative of decree-holder"—Applicability of S. 47 to dispute between auction-purchaser and private purchaser after attachment from judgment-debtor.

In execution of a money decree certain immovable property was attached on 18th September, 1921. On 26th September, 1921, the judgment-debtor's widow sold the property to X. On 7th January, 1922, the property was sold in execution proceedings and *A* a stranger became the auction-purchaser. On 1st March, 1932, *A* filed a suit for possession of the property. The suit was resisted by *X* who contended that S. 47, Civil Procedure Code, was a bar to the institution of the suit.

Held (*Patanjali Sastri, J.*, dissenting), (*i*) A stranger who purchases property at a Court auction held in execution of a money decree, is not a representative of the decree-holder.

Per *Patanjali Sastri, J.*—Such a stranger purchaser is to be regarded as a representative of the decree-holder, but in his case as soon as the sale is confirmed and the purchase money is paid to the decree-holder the debt due under the decree is satisfied *pro tanto* or in full as the case may be and so far as the property sold is concerned the execution is at an end. Therefore the delivery of possession to a stranger purchaser cannot be said to relate to execution, discharge or satisfaction of the decree.

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* S. A. No. 86 of 1935. 25th October, 1940.

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By the Court.—Such stranger-auction-purchaser is not entitled to apply for possession as against the judgment-debtor or his representative in interest under S. 47, Civil Procedure Code.

(*ii*) S. 47, Civil Procedure Code, does not apply to a case where the dispute arises between a party and his own representative or between two persons who both represent the same party.

(*iii*) The suit is therefore not barred by S. 47, Civil Procedure Code.

Case-law discussed.

Subbu Thayammal v. *Chidambara Asari*, (1901) I.L.R. 25 Mad. 383; *Sorimuthu Pillai* v. *Muthukrishna Pillai*, (1932) 65 M.L.J. 253: I.L.R. 56 Mad. 808 and *Narasimha Aiyar* v. *Venkatachalapathi Aiyar*, (1933) 67 M.L.J. 207: I.L.R. 57 Mad. 457, overruled.

Appeal against the decree of the District Court of Chittoor in A. S. No. 55 of 1934 preferred against the decree of the Court of the District Munsif of Tirupati in O. S. No. 69 of 1932.

K. Rajah Aiyar and *V. Ramaswami Aiyar* for Appellant.

T. M. Krishnaswami Aiyar and *T. K. Srinivasathathachariar* for Respondents.

Krishnaswami Aiyangar and Somayya, JJ., made the following

ORDER OF REFERENCE TO THE FULL BENCH.*

The plaintiff appeals against the decrees of the lower Courts dismissing the suit for possession on the ground that S. 47 of the Code of Civil Procedure bars the suit. This question was tried as a preliminary issue and both the Courts held that the suit is barred by S. 47 of the Code of Civil Procedure. In execution of a money decree obtained by one Kalathi, the suit house was attached on 18th September, 1921. On the 26th September, 1921, the judgment-debtor's widow sold the property to the first defendant. The second defendant is the tenant of the first. In pursuance of the attachment made on 18th September, 1921, the auction sale was held on 7th January, 1922, and the plaintiff, a stranger, purchased it in Court auction. For some reasons which it is not necessary to go into at present, the sale certificate was not obtained till 30th November, 1931. On 1st March, 1932, the suit out of which the present appeal arises was filed by the plaintiff for recovery of the suit property from defendants 1 and 2. Defendants raised various pleas with one of which alone we are concerned in this appeal and that is whether the suit is barred by S. 47 of the Code of Civil Procedure.

Plaintiff as stated above is a stranger auction-purchaser. Under S. 47 of the Code of Civil Procedure two conditions have to be satisfied:

* 4th May, 1939.

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(1) the question must arise between the parties to the suit or their representatives in interest;

(2) the question must relate to the execution, discharge or satisfaction of the decree.

So far as the second question is concerned, the application for delivery of property purchased in execution of a decree is a matter relating to execution, satisfaction or discharge of the decree. This question has been considered in several cases which arose between the decree-holder auction-purchaser on the one side and the judgment-debtor on the other. The view of the Madras High Court has throughout been that such a question relates to execution, satisfaction or discharge of the decree. It is unnecessary to do more than refer to the recent decision of the Full Bench of this Court reported in *Krishna Aiyar* v. *Subramania Aiyar*[1]. There is a conflict of opinion among the various High Courts and we are bound by the decisions of our Court and these decisions lay down that such a question arising between the decree-holder purchaser (or a subsequent vendee from him) on the one side and the judgment-debtor (or a later purchaser from him) on the other side falls within S. 47.

On principle once the attached properties are sold, the sale confirmed, and the sale proceeds paid over to the decree-holder, the decree-holder drops out and is not interested in the question whether the auction-purchaser gets possession or not. This question is not one which relates to execution, discharge or satisfaction of the decree and hence S. 47 would not apply to proceedings taken by the auction-purchasers for possession of the properties. So *prima facie* even between a decree-holder auction-purchaser and the judgment-debtor this question of delivery of possession appears to be outside S. 47 of the Code of Civil Procedure. This is the view held by several High Courts.

In Madras for a long time this question has been held to come under S. 47 of the Code of Civil Procedure. But even in this Court the position has not been accepted without demur. From time to time this Court has expressed the view that but for a series of decisions holding one way, they would be prepared to hold that the question did not fall under S. 47 of the Code of Civil Procedure (*Kattayat Pattumayi* v. *Raman Menon*[2] and *Sandu Taraganar* v. *Hussain Sahib*[3]).

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1. (1939) 1 M.L.J. 468: I.L.R. (1939) Mad. 456 (F.B.).
2. (1902) 13 M.L.J. 237: I.L.R. 26 Mad. 740 at 741.
3. (1904) 14 M.L.J. 474: I.L.R. 28 Mad. 87 at 88.

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The question, we are told, is under appeal to the Judicial Committee. In *Venkatakrishnayya* v. *Venkatanarayana*[1], Justice Ramesam and Justice Cornish had to consider this question and that case is, we understand under appeal to the Judicial Committee and we hope that this conflict would be set at rest by a pronouncement of the Judicial Committee.

Every one of the decisions, however, have (with a very few exceptions) dealt with a case of a decree-holder auction-purchaser seeking to recover possession. It does seem to be an extraordinary contention to urge that even a stranger auction-purchaser is bound to proceed in the execution department and that a separate suit is barred.

The first question raises the point whether when a stranger auction-purchaser files an application for delivery against the judgment-debtor or a purchaser from him the question is one between the parties to the suit or their representatives in interest. In the case of a money decree a stranger auction-purchaser is not a representative of the decree-holder. As pointed out by Mr. Justice Oldfield and Mr. Justice Seshagiri Aiyar in *Veyindramuthu Pillai* v. *Maya Nadan*[2]:

"The weight of authority in this Court is that a stranger auction-purchaser in execution of money decree is only a representative of the judgment-debtor."

According to Abdur Rahim, Officiating Chief Justice, the question whether the auction-purchaser is a representative of the judgment-debtor or of the decree-holder depends upon the nature of the question raised and who the contesting party is. The other two Judges distinctly held that a stranger auction-purchaser in execution of a money decree is not a representative of the decree-holder but a representative of the judgment-debtor: (*Vide* p. 128, Oldfield, J., and pages 129 and 130, Seshagiri Aiyar, J.) As pointed out by Mr. Justice Seshagiri Aiyar the decree-holder beyond being the instrument for bringing the property to sale does not, ordinarily speaking, transmit any of his rights to the auction-purchaser:

"It is on the motion of the decree-holder that the Court proceeds to sell the property of the judgment-debtor and the principle of *caveat emptor* has been applied to purchases so made."

Abdur Rahim, J., himself held in a later ruling in *Yagnasami Aiyar* v. *Chidambaranatha Mudaliar*[3], that in such cases, the auction-purchaser is the representative of the judgment-debtor.

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1. A.I.R. 1936 Mad. 733.
2. (1919) 38 M.L.J. 32 : I.L.R. 43 Mad. 107 (F.B.).
3. (1920) 13 L.W. 15.

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This being so, it is clear that the question that arises in this case is between the judgment-debtor's private vendee on the one side and the auction-purchaser in execution of the money decree on the other side who is also a representative of the judgment-debtor. The question does not arise between the parties in the suit if by that expression it is understood parties who were arrayed on opposite sides in the suit. This takes us to the next question whether S. 47 applies to a case where the dispute is between two persons both of whom claim under the judgment-debtor that is under the same party.

It is argued that S. 47 applies even to cases where the question arises between a party to a suit and his own representatives or between two persons who both represent the same party. Reliance is placed by the respondents on the decisions in *Subbu Thayammal* v. *Chidambara Asari*[1], *Mangayya* v. *Sriramulu*[2], *Vedaviasa Aiyar* v. *The Madura Hindu Labha Nidhi, Ltd.*[3], *Venkata Sastri* v. *Venkatagopaladu*[4] and *Narasimha Aiyar* v. *Venkatachalapathi Aiyar*[5].

In *Subbu Thayammal* v. *Chidambara Asari*[1], it was held that the question between the decree-holder and his assignee whether the assignee is entitled to execute the decree came under S. 244 of the old Code of Civil Procedure, now S. 47, and reliance was placed upon a decision reported in the foot-note on page 384. There is no discussion in *Subbu Thayammal* v. *Chidambara Asari*[1], or in the case reported in the foot-note as to how the question between the decree-holder and an assignee from him came within S. 244, now S. 47. In *Mangayya* v. *Sriramulu*[2], the question arose as to whose property (that is of which defendant's) should be sold first. It was held that where two persons who were both parties to the suit had conflicting interests in the suit and their conflicting claims were decided, then the requirements of S. 47 are satisfied. In *Vedaviasa Aiyar* v. *The MaduraHindu Labha Nidhi, Ltd.*[3], the question arose between two defendants in a mortgage suit as to whose property should be sold first. There was a conflict between the two defendants *inter se* in the suit itself and this was held to raise a question under S. 47 of the Code of Civil Procedure. On page 479 it is pointed out referring to the decision in *Yagnasami Aiyar* v. *Chidambaranatha Mudaliar*[6] and other cases that in each of those cases the matter under consideration referred to a dispute

1. (1901) I.L.R. 25 Mad. 383. 2. (1913) 24 M.L.J. 477.
3. (1923) 45 M.L.J. 478. 4. (1924) 20 L.W. 742.
5. (1933) 67 M.L.J. 207 : I.L.R. 57 Mad. 457.
6. (1920) 13 L.W. 15.

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between the judgment-debtor and his own representative. The Judges held that where the question arose between two persons who were both parties to the suit and had conflicting interests in the suit itself S. 47 would apply on the ground that the wording of it is general. In *Venkata Sastri* v. *Venkatagopaladu*[1], the question arose between a person who sold some immovable property to one person after executing a contract of sale in favour of another person. The person in whose favour the contract of sale was executed filed a suit impleading the owner as the first defendant and the subsequent purchaser as the second defendant. A decree was passed and some amount was deposited by the plaintiff. In execution of that decree the question arose whether the subsequent purchaser was the person who was to execute the sale deed and receive the amount deposited in Court. The original owner opposed the application by the subsequent purchaser for the withdrawal of the amount and it was held that the subsequent purchaser was entitled to draw the amount. The suit which ultimately came up for decision before Mr. Justice Madhavan Nair was filed by the original owner of the property against the subsequent purchaser for recovery of the amount. It was urged by the plaintiff that the question as to who was entitled to the amount deposited in pursuance of the previous decree was one which fell under S. 47 of the Code of Civil Procedure. Mr. Justice Madhavan Nair held following the decisions in *Mangayya* v. *Sriramulu*[2] and *Vedaviasa Aiyar* v. *The Madura Hindu Labha Nidhi, Ltd.*[3], that the plaintiff and defendant in the latter suit occupied conflicting positions in the previous suit. He therefore held that the question which arose between these two parties fell within the purview of S. 47. It will be noticed that the question was raised in the previous suit in execution and was decided against the plaintiff in the latter suit. In *Narasimha Aiyar* v. *Venkatachalapathi Aiyar*[4], the question related to an assignment of the decree; the assignee applied to have the assignment recognised and it was opposed by the decree-holder on the ground that the assignment was not supported by consideration. The application was dismissed and the assignee appealed and it was held that such a question fell within S. 47 of the Code of Civil Procedure. Reliance was placed upon the clause in S. 47 requiring the Court to determine whether a person is a representative of a party to a suit or not in the execution itself for the purpose of that section. This clause only means that where a person claiming to

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1. (1924) 20 L.W. 742. 2. (1913) 24 M.L.J. 477.
3. (1923) 45 M.L.J. 478. 4. (1933) 67 M.L.J. 207: I.L.R. 57 Mad. 457.

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be the representative of the decree-holder filed an application against the judgment-debtor and the judgment-debtor denied that the applicant is a representative of the decree-holder that question should be determined by the executing Court for the purpose of S. 47 and similarly where a person is alleged to be a representative of the judgment-debtor. There is no reference in the decision in *Narasimha Aiyar* v. *Venkatachalapathi Aiyar*[1], to any of the earlier decisions of this Court which took the contrary view. In *Yagnasami Aiyar* v. *Chidambaranatha Mudaliar*[2], Mr. Justice Abdur Rahim and Mr. Justice Odgers held that a question between one party and his own representative does not come under S. 47. In *Budaraju Hanumantha Rao* v. *Allamneni Krishnamma*[3], a decision of the Madras High Court, one of two joint decree-holders transferred his interest to a third party and the transferee applied for recognition of the transfer and for further execution. The application was opposed by the other joint decree-holder and it was held that the question between them was not one falling under S. 47 and reference was made to a number of earlier decisions which laid down the rule in the same way. None of these decisions was referred to in the decisions in *Narasimha Aiyar* v. *Venkatachalapathi Aiyar*[1]. In *Ramaswami Sastrulu* v. *Kameswaramma*[4], *Mangayya* v. *Sriramulu*[5], *Ananvasadar Khan Pami Sahib* v. *Misiri Khan Pami Sahib*[6], *Yagnasami Aiyar* v. *Chidambaranatha Mudaliar*[7], *Raman Chettiar* v. *Chokkalingam Chettiar*[8], the rule is laid down in the same way. In *Raman Chettiar* v. *Chokkalingam Chettiar*[8], the case was between two persons one claiming to be an assignee from the decree-holder and the other claiming to have a charge over the decree-holder's interest. Mr. Justice Waller and Mr. Justice Madhavan Nair held that this question was one between persons who occupied substantially the position of decree-holder, that judgment-debtors in the suit had nothing to do with this dispute and that therefore no appeal lay under S. 47. It will be noticed that in *Narasimha Aiyar* v. *Venkatachalapathi Aiyar*[1], the decision confirmed on Letters Patent Appeal was one passed by Mr. Justice Waller. In his decision Mr. Justice Waller does not refer to his earlier decision in *Raman Chettiar* v. *Chokkalingam Chettiar*[8]. It was not apparently referred to before him. The decision in *Raman Chettiar* v. *Chokkalingam Chettiar*[8] and the one in *Narasimha Aiyar* v. *Venkatachalapathi Aiyar*[1], are directly contrary to each

1. (1933) 67 M.L.J. 207: I.L.R. 57 Mad. 457.
2. (1920) 13 L.W. 15.
3. (1922) 70 I.C. 329.
4. (1900) 10 M.L.J. 126: I.L.R. 23 Mad. 361 (F.B.).
5. (1913) 24 M.L.J. 477.
6. (1916) 31 M.L.J. 44.
7. (1921) 16 L.W. 760.
8. (1925) 24 L.W. 70.

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other. In *Anavansadhar Khan Pami Sahib* v. *Misiri Khan Pami Sahib*[1], a Receiver was appointed at the instance of the decree-holder and after satisfaction of the decree amount the question arose as to whom among various defendants the property should be handed back. Such a question was held by the learned Judges not to fall under S. 47 as the decree-holder had no interest in the question between two judgment-debtors each of whom claimed possession. The Judges (Sadasiva Aiyar and Moore, JJ.) referred to an earlier decision of theirs in *Krishna Bhupati Devu Garu* v. *Venkataswami*[2], where the law was laid down similarly.

We think therefore that the decision in *Narasimha Aiyar* v. *Venkatachalapathi Aiyar*[3], and the cases laying down the rule in similar terms require re-consideration and that the conflict between the various decisions of this Court requires to be set at rest. On principle the decisions in *Yagnasami Aiyar* v. *Chidambaranatha Mudaliar*[4], and the other cases falling within that group appear to take the correct view.

The respondent urges an independent ground that the Privy Council decided in *Prosunno Kumar Sanyal* v. *Kali Das Sanyal*[5], that irrespective of the question whether the dispute arises between two persons who were arrayed against each other in the previous suit the question as to delivery of possession must be decided in the previous suit itself. He urges that the decision of the Full Bench in *Veyindramuthu Pillai* v. *Maya Nadan*[6], also decides this point in his favour. The case that went up to the Judicial Committee in *Prosunno Kumar Sanyal* v. *Kali Das Sanyal*[5], was a suit filed to set aside an auction sale which had been held in execution of a money decree. The suit was filed by the judgment-debtors on the ground that the sale was brought about fraudulently. They were defendants in the previous suit and had applied in the execution department in the previous suit for setting aside the sale. Their application was dismissed and the order was confirmed on appeal. Then a suit was filed by them for setting aside that very sale on the ground of fraud, namely, that the decree-holder had agreed after receiving their quota of the decree debt not to proceed against their shares of the property but had brought their shares to sale in execution of that very decree in breach of his agreement and that therefore fraud was practised by the decree-holder on

1. (1916) 31 M.L.J. 41. 2. (1914) 3 L.W. 105.
3. (1933) 67 M.L.J. 207 : I.L.R. 57 Mad. 457.
4. (1920) 13 L.W. 15.
5. (1892) L.R. 19 I.A. 166 : I.L.R. 19 Cal. 683 (P.C.).
6. (1919) 38 M.L.J. 32 : I.L.R. 43 Mad. 107 (F.B.).

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them. In a short judgment Lord Macnaghten upheld the decisions of the Indian Courts that the question which the plaint sought to raise could only be determined by the Court which executed the decree and that in such a case a separate suit for the purpose of setting aside the sale was barred by S. 244 of the Code of Civil Procedure. Dealing with the argument of Mr. Doyne who appeared for the appellants that the auction-purchaser was also interested in the question of setting aside the sale and that therefore the question did not arise between the parties to the suit in which the decree was passed, it was laid down:

> "That when a question has arisen as to execution, discharge or satisfaction of a decree between the parties to the suit in which the decree was passed, the fact that the purchaser who is not a party to the suit is interested in the result has never been held to be a bar to the application of the section."

It will be observed that according to this decision the question must have arisen between the parties to the suit in which the decree was passed. It must relate to the execution, discharge or satisfaction. If both these tests are satisfied, then the mere fact that a purchaser who is not a party to the suit is interested in the result of the decision does not prevent the applicability of S. 47. It will be noticed that in this case it never occurred to any one to suggest that the stranger auction-purchaser could be regarded as a representative of the decree-holder for the purpose of delivery of possession. This would support the decision of Mr. Justice Oldfield and Mr. Justice Seshagiri Aiyar on this question in *Veyindramuthu Pillai* v. *Maya Nadan*[1], and of Abdur Rahim, J., in *Yagnasami Aiyar* v. *Chidambaranatha Mudaliar*[2].

How the learned Advocate for the respondent before us wants to read this decision is that if the question related to the discharge, execution or satisfaction of the decree, S. 47 always applied even though it did not arise between the parties to the suit, that is, even though in the decision of the question one of the parties to the suit was not at all interested. This view practically abrogates one requirement of S. 47 that the question should arise between the parties to the suit. The decision was expressly based upon the ground that in that case the question whether a sale should be set aside or not was one between the judgment-debtor and the decree-holder. The judgment-debtor alleged that the decree-holder in fraud of his express agreement with him had brought the property to sale and that therefore the sale was vitiated by fraud practised by the decree-holder. This question was one

1. (1919) 38 M.L.J. 32: I.L.R. 43 Mad. 107 (F.B.).
2. (1920) 13 L.W. 15.

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in which the decree-holder and the judgment-debtor were interested and it was a straight fight between them. All that the Judicial Committee held was that in such a case the judgment-debtor cannot file a separate suit for setting aside the sale and cannot escape the applicability of S. 244 merely by reason of the fact that the auction-purchaser was also interested in the decision of this dispute. It was pointed in *Maganlal Mulji* v. *Doshi Mulji*[1], by Sir Lawrence Jenkins, C.J., that this is the correct view to be taken of the decision of the Judicial Committee in *Prosunno Kumar Sanyal* v. *Kali Das Sanyal*[2]. In that case a stranger auction-purchaser purchased some property in execution of a money decree, The judgment-debtor paid the money under S. 310-A, now O. 21, r. 89 and the decree-holder was paid in full. Then the judgment-debtor applied to have the sale set aside and the auction-purchaser resisted. Sir Lawrence Jenkins, C.J., pointed out that at best the auction-purchaser was a representative of the judgment-debtor and that in the question that arose for decision, the decree-holder was not at all interested. It was therefore held that to a case where the dispute was between a party to a suit and his own representative, S. 244 (now S. 47) would not apply. He dealt with the argument based upon the decision in *Prosunno Kumar Sanyal* v. *Kali Das Sanyal*[2] and pointed out the correct view to be taken of the decision of the Judicial Committee. The same view is expressed of that decision by Mr. Justice Ramesam in *Periyaya Ambalam* v. *Arulappan*[3]. It is urged by the respondent's counsel that the Full Bench decision in *Veyindramuthu Pillai* v. *Maya Nadan*[4], lays down the rule as contended for by him and that the question is therefore concluded by the decision of the Full Bench. Before dealing fully with that case we may draw attention to the way in which Mr. Justice Seshagiri Aiyar answers that question. On page 132 Mr. Justice Seshagiri Aiyar laid down:

> "I would therefore answer all the questions referred to us by saying that if the points for decision in an application before the executing Court relate *to rival rights* of the *decree-holder and of the judgment-debtor* and also relate to execution, discharge or satisfaction of the decree it should be dealt with in execution and not by separate suit." (The italics are ours).

Put in such a way, the decision does not lay down the proposition contended for by the learned advocate for the respondent. There must be a question in which the rival rights of the decree-holder and the judgment-debtor arise for decision. In the case before us the execution sale was confirmed, the decree-holder was

1. (1901) I.L.R. 25 Bom. 631.
2. (1892) L.R. 19 I.A. 166 : I.L.R. 19 Cal. 683 (P.C.).
3. A.I.R. 1928 Mad. 806.
4. (1919) 38 M.L.J. 32 : I.L.R. 43 Mad. 107 (F.B.).

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paid, and in the question whether the auction-purchaser is to get possession or not the decree-holder is in no way interested in either contingency.

In the case in *Veyindramuthu Pillai* v. *Maya Nadan*[1], the question arose in execution of a mortgage decree. In execution of that decree some properties were purchased by the decree-holder himself and some by a stranger. Sometime before that, a third party filed a suit against the same defendant, obtained a money decree and attached the property which had been mortgaged already. The statement of facts on page 108 reads as though the mortgage which gave rise to the suit was itself executed after the attachment in execution of the money decree but we have verified from the records and found that the mortgage was long anterior to the money suit. The attachment in execution of the money decree was on 21st June, 1916, the suit on the mortgage was filed on 14th July, 1916, the auction sale in execution of the money decree was held on 25th October, 1916, the sale was confirmed on 25th November, 1916, and the properties were delivered on the 12th February, 1917. At that sale the decree-holder himself became the purchaser and he later on sold it to the appellant in the High Court. The two purchasers in execution of the mortgage decree were obstructed by the appellant and the obstruction was removed on an application to the executing Court in the mortgage decree and the appellant was directed to hand over possession to the purchasers under the mortgage decree. Appeals were preferred against those orders there being three appeals before the High Court. The parties to the proceedings in the Court below were the purchasers in execution of the mortgage decree on the one side and the purchaser in execution of the money decree on the other side. Objection was taken that no appeal lay at the instance of the appellant who was the purchaser from the decree-holder auction-purchaser in execution of the money decree. It was contended that the appellant was a representative of the judgment-debtor in the money suit and therefore of the defendant in the mortgage suit. It was also contended that the stranger auction-purchaser in execution of the mortgage decree was a representative of the decree-holder in that suit. If that were so the question would be between a representative of the defendant mortgagor on the one side and the decree-holder auction-purchaser or his representative, the stranger auction-purchaser in the mortgage suit, on the other. If the appellant in the High Court was the representative of the mortgagor but the stranger auction-purchaser in execution of the mortgage decree was not a representative of the mort-

1. (1919) 38 M.L.J. 32: I.L.R. 43 Mad. 107 (F.B.).

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gage decree-holder but only of the mortgagor defendant, then the question so far as this item was concerned would be one between two representatives of the same party. Mr. Justice Oldfield and Mr. Justice Seshagiri Aiyar referred three questions for decision by the Full Bench. They are all set out on page 113:

"1. Whether a purchaser at a sale held in execution of a money decree is a representative of a party and, if so, of which party for the purpose of inquiry into a question relating to the execution of (a) that money decree, (b) any other decree affecting the purchased property and against the same judgment-debtor.

2. Whether a purchaser from a decree-holder purchaser under a money decree is a representative of a party for either of these purposes and, if so of which.

3. Whether a stranger purchaser at a sale in execution of a mortgage decree is the representative of a party and, if so, of which."

Abdur Rahim, Offg. C. J., considered the question whether an auction-purchaser in execution of money decree is to be deemed a representative of the decree-holder or the judgment-debtor in that suit. If he is considered to be a representative of the judgment-debtor in that suit then he would be a person claiming under the defendant in the mortgage suit as the auction sale in execution of the money decree was subsequent to the institution of the mortgage suit. This answer would no doubt lead to the conclusion that in those applications in which the question arose between the mortgagee decree-holder auction-purchaser and the appellant before the High Court the question of delivery would be directly between the decree-holder on the one side and the judgment-debtor's representative on the other. But this by itself would not solve the question in the case between the stranger purchaser in execution of the mortgage decree (as I already observed, some lots were purchased by a stranger auction-purchaser) and the appellant who was the representative of the mortgagor. The question would still remain whether the stranger auction-purchaser in the mortgage decree was a representative of either party to the mortgage suit and if so of which party? That is one of the questions formulated for decision at page 113. But this question is not answered in any of the judgments. Applying the tests laid down by Mr. Justice Seshagiri Aiyar on pages 131 and 132 the question of delivery of possession of that particular item was not one in which the decree-holder in the mortgage suit was interested. So point b as formulated on page 131 would not be satisfied. Whether a stranger auction-purchaser succeeds in obtaining the possession of the property which he purchased or not, the decree-holder was absolutely unaffected. Therefore if we adopt the proposition of Seshagiri Aiyar, J., the answer should be that it is not a case falling under S. 47. In the judgments of the other two learned Judges there are

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some observations which show that they considered that the decision in *Prosunno Kumar Sanyal* v. *Kali Das Sanyal*[1], held that all questions relating to execution must be decided in the execution department and not by a separate suit. When the matter came up before the Division Bench, Justice Oldfield and Justice Seshagiri Aiyar seem to have thought that the opinion of the Full Bench would govern all the cases. Then they decided the question on the merits. This decision is reported in *Veyindramuthu Pillai* v. *Maya Nadan*[2]. It will be observed that there is no discussion as to how the Full Bench decision applied to the case in which the stranger auction-purchaser in execution of the mortgage decree was interested. It is therefore really the assumption on which the decision in *Veyindramuthu Pillai* v. *Maya Nadan*[2], is based that can be said to be the authority for the proposition that as between the stranger auction-purchaser and the mortgagor or his representative the question of delivery of possession of the property purchased in execution is also a matter falling under S. 47. It will be observed that Mr. Justice Oldfield refers on page 127 to a decision in *Krishna Satapasti* v. *Sarasvatula Sambasiva Rao*[3] and does not express any disapproval of it. Now the decision in *Krishna Satapasti* v. *Sarasvatula Sambasiva Rao*[3] is upon the very question, namely, whether as between a stranger auction-purchaser and the judgment-debtor the question of delivery of possession of the property purchased in Court auction would come under S. 244 and the decision was that it did not. If the decree-holder himself was the purchaser and he sought possession from the judgment-debtor or from a purchaser from the judgment-debtor the case would fall under S. 47. Similarly if a person who purchases from the decree-holder Court auction-purchaser seeks possession from the judgment-debtor or a purchaser from him, the question is still under S. 47 but where the Court auction-purchase itself was by a stranger auction-purchaser, *Krishna Satapasti* v. *Sarasvatula Sambasiva Rao*[3], decides that that is not a case which would fall under S. 244, now S. 47. This decision is declared to be in some respects not the law in the judgment of the Officiating Chief Justice at page 124 but to what extent this decision must be considered to have been overruled is not very clear from the judgment. So far as we can see there is no decision anywhere in any of the High Courts including the Madras High Court which holds expressly that a stranger auction-purchaser must apply in execution department itself for possession of the property purchased by him and that a separate suit therefor is barred under S. 47.

1. (1892) L.R. 19 I.A. 166: I.L.R. 19 Cal. 683 (P.C.).
2. (1919) 39 M.L.J. 456: I.L.R. 43 Mad. 696.
3. (1908) I.L.R. 31 Mad. 177.

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The decision of Sir Lawrence Jenkins, C. J., in *Maganlal Mulji* v. *Doshi Mulji*[1], is referred to with approval by Mr. Justice Oldfield in *Veyindramuthu Pillai* v. *Maya Nadan*[2].

We may also point out that in the case which is reported in *Yagnasami Aiyar* v. *Chidambaranatha Mudaliar*[3], Mr. Justice Abdur Rahim laid down that before S. 47 could apply the question must be one between the rival parties to the suit or their representatives and not between a party and his own representative. The decision of the Full Bench in *Veyindramuthu Pillai* v. *Maya Nadan*[2], was referred to in the judgment. Evidently Abdur Rahim, J., himself did not understand the Full Bench decision in *Veyindramuthu Pillai* v. *Maya Nadan*[2], as dispensing with the requirement that the question must be one between the parties to the suit or their representatives. Mr. Justice Abdur Rahim in *Yagnasami Aiyar* v. *Chidambaranatha Mudaliar*[3] refers to the Full Bench in *Veyindramuthu Pillai* v. *Maya Nadan*[2], as deciding that the purchaser in execution of a money decree is a representative of the judgment-debtor. He is there evidently acquiescing in the majority view expressed by Justices Oldfield and Seshagiri Aiyar. In holding that the question must arise between the rival parties to the suit Mr. Justice Abdur Rahim relied upon the decision of the Bombay High Court in *Maganlal Mulji* v. *Doshi Mulji*[1]. It is therefore difficult to say that Mr. Justice Abdur Rahim laid down the proposition in *Veyindramuthu Pillai* v. *Maya Nadan*[2] that the question need not arise between the parties to the suit and that a question between a party and his own representative was also within S. 47 of the Code of Civil Procedure.

There is however one decision in *Jainulabdin Sahib* v. *Krishnan Chettiar*[4] which needs scrutiny. In that case a stranger auction-purchaser in obtaining possession through the Court Amin took possession of much more than what he was entitled to under the sale certificate. The judgment-debtor filed a suit for recovery of possession of what he alleged was wrongfully taken by the stranger auction-purchaser in the delivery proceedings and objection was taken in the High Court that the suit was barred by S. 47. Mr. Justice Krishnan held that the decision of the Full Bench in *Veyindramuthu Pillai* v. *Maya Nadan*[2] was that even in the case of a stranger auction-purchaser the question of delivery of possession must be fought out in that suit itself in execution department and that a separate suit is barred by S. 47 of the Code of Civil Procedure. Ayling, J., observ-

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1. (1901) I.L.R. 25 Bom. 631.
2. (1919) 38 M.L.J. 32: I.L.R 43 Mad. 107 at 125 (F.B.).
3. (1920) 13 L.W. 15.
4. (1921) 41 M.L.J. 120.

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ed that the Full Bench judgment in *Veyindramuthu Pillai* v. *Maya Nadan*[1], seemed to extend the applicability of S. 47 to a degree hardly suggested by the wording of that section but he was not prepared to dissent from the view of that judgment taken by his colleague Mr. Justice Krishnan. This matter was considered by Mr. Justice Ramesam in the decision reported in *Periyaya Ambalam* v. *Arulappan*[2]. Mr. Justice Ramesam pointed out that the decision of the Judicial Committee in *Prosunno Kumar Sanyal* v. *Kali Das Sanyal*[3] cannot apply to a case where the question did not involve the rival claims of the parties to the suit, that is, between the decree-holder on the one side and the judgment-debtor on the other side. He referred to the decision in *Veyindramuthu Pillai* v. *Maya Nadan*[1] and to that of Mr. Justice Krishnan in *Jainulabdin Sahib* v. *Krishnan Chettiar*[4] and while dissenting from the view of Mr. Justice Krishnan expressed in *Jainulabdin Sahib* v. *Krishnan Chettiar*[4] Mr. Justice Ramesam did not think it necessary to refer it to a Bench. He takes it that the Full Bench in *Veyindramuthu Pillai* v. *Maya Nadan*[1], did not decide that the question between the stranger auction-purchaser and the judgment-debtor fell within S. 47 of the Code of Civil Procedure and observed that it is only *Veyindramuthu Pillai* v. *Maya Nadan*[5], that decided or assumed it to be so.

It is urged that the decree-holder at whose instance the property was put up for sale in execution is bound to see that the sale is completed in all its stages, that delivery of property to the purchaser is one such stage that he should see to the last stage of the transaction, and that therefore he is also interested in the question of delivery of possession. He urges that in the case of a private sale the vendor is bound to put the vendee in possession and asks us to apply the same rule by analogy in the case of a Court sale. We are unable to appreciate the analogy pressed before us by the learned counsel. Differences between a private sale and a Court auction are obvious. If it means that the decree-holder is in law bound to see that the purchaser is put in possession we are not aware of any such rule of law. This is not the ground which was suggested in any of the decisions which have been brought to our notice.

As pointed out in a recent case in L. P. A. No. 70 of 1937, the question as to the applicability of S. 47 depends upon the question

1. (1919) 38 M.L.J. 32: I.L.R. 43 Mad. 107 (F.B.).
2. A.I.R. 1928 Mad. 806.
3. (1892) L.R. 19 I.A. 166: I.L.R. 19 Cal. 683 (P.C.).
4. (1921) 41 M.L.J. 120.
5. (1919) 39 M.L.J. 456: I.L.R. 43 Mad. 696.

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at issue. In that case a Court sale was held under which money was paid by a stranger auction-purchaser and drawn out by the decree-holder. Thereafter the judgment-debtor applied to have the sale set aside and the sale was set aside. The auction-purchaser filed an application for return of the money from the decree-holder under r. 93 of O. 21. The decree-holder objected that the applition was barred by limitation. The first Court held that it was not barred and directed the decree-holder to refund the amount. The decree-holder filed an appeal. The question was whether an appeal lay and whether it was a matter coming under S. 47. If the law is that the auction-purchaser is always a representative of the judgment-debtor then the question in that case was between the decree-holder who was resisting the application for refund of money and the stranger auction-purchaser who according to the above rule would be a representative of the judgment-debtor. The result should be that an appeal would lie but it was held in that decision that the matter did not come under S. 47. As pointed out therein we have to see what the nature of the question involved is. Once the auction sale was set aside and that decision became final the judgment-debtor was not interested at all in the question whether the decree-holder was bound to refund the amount. The question arose between the decree-holder on the one side and the auction-purchaser on the other side but in that question the judgment-debtor was not interested. Therefore there was no rival claim between the decree-holder and the judgment-debtor so as to bring the case under S. 47 of the Code of Civil Procedure. In claiming the money back after the sale had been finally set aside, the auction-purchaser was representing no one but himself. He claimed the money in his own right. He had ceased to be the representative of the judgment-debtor. In such a case S. 47 would not apply. In cases where the rights of third parties to the properties purchased in Court auction come up for decision the auction-purchaser would be a representative of the judgment-debtor. There is much to be said for the view that the auction-purchaser represents no one but himself in the delivery proceedings. He wants possession of the properties which he has purchased. He is opposed by the judgment-debtor. It is difficult to postulate that in such a case the auction-purchaser is a representative of the judgment-debtor who is fighting him tooth and nail. We are inclined to say as was said in the L. P. A. No. 70 of 1937 that in such a case the auction-purchaser represents neither the decree-holder nor the judgment-debtor but he represents himself only. We must see in each case how the question arises and whether in the determination of this particular question, he is a representative of this party or that party. In this state of things

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we cannot but endorse the statement in Mr. Mulla's Code of Civil Procedure on page 181 (Tenth Edition) that so far as the Madras High Court is concerned the question whether a stranger auction-purchaser is bound to seek delivery in that very suit and whether a separate suit is barred is in 'a hopeless state of uncertainty'. As he points out the conflict was sought to be set at rest by a reference to a Full Bench in *Veyindramuthu Pillai* v. *Maya Nadan*[1], but it cannot be said that the object has been achieved. In this state of authorities we would suggest that the matter should be referred to a Full Bench so constituted as to be in a position to deal with the correctness of the opinions of the Judges in *Veyindramuthu Pillai* v. *Maya Nadan*[1]. We need hardly add that a question of this kind should be settled authoritatively. We frame the following questions for consideration and decision of the Full Bench:

"1. Whether an application by a stranger auction-purchaser for delivery of possession as against the judgment-debtor or his representative is covered by S. 47?

2. Whether S. 47 applies to a case where the dispute arises between a party and his own representative or between the two persons who both represent the same party?"

This appeal came on for hearing on the above Order of Reference to a Full Bench.

The Court expressed the following

OPINION.* *The Chief Justice.*—This Full Bench has been constituted to decide two questions referred by Krishnaswami Aiyangar and Somayya, JJ., in a second appeal arising out of a suit for possession. The two questions are: Leach, C. J.

"1. Whether an application by a stranger auction-purchaser for delivery of possession as against the judgment-debtor or his representative is covered by S. 47 (C. P. Code)?

2. Whether S. 47 applies to a case where the dispute arises between a party and his own representative or between the two persons who both represent the same party?"

Before proceeding to discuss these questions I will state the circumstances under which they arise.

One Kalathi Mudaliar obtained a money decree and on the 18th September, 1921, in execution of that decree attached certain immovable property. On the 26th September, 1921, the judgment-debtor's widow sold the property to defendants 1 to 3. On the 7th January, 1922, the property was sold by the Court in the execution proceedings and the plaintiff, a

1. (1919) 38 M.L.J. 32: I.L.R. 43 Mad. 107 (F.B.).
* 25th October, 1940.

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stranger, became the auction-purchaser. On 1st March, 1932, the plaintiff filed a suit for possession of the property. The trial Court (the District Munsif's Court of Tirupathi) dismissed the suit on the ground that S. 47 of the Code of Civil Procedure barred its institution. The plaintiff then appealed to the Court of the District Judge of Chittoor, who concurred in the decision of the trial Court and against his decision the second appeal out of which this reference arises was filed. The learned Judges who have made the reference have made an exhaustive examination of the authorities, and although it will be necessary to refer to some of the cases with which they have dealt it will not be necessary to travel over all the ground.

S. 47 of the Code of Civil Procedure reads as follows:

"1. All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit.

2. The Court may, subject to any objection as to limitation or jurisdiction, treat a proceeding under this section as a suit or a suit as a proceeding and may, if necessary, order payment of any additional court-fees.

3. Where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purposes of this section, be determined by the Court."

It will be observed that for a matter to come within the purview of the section the following conditions must be fulfilled: (*i*) It must relate to a question arising between the parties to the suit in which the decree was passed or their representatives, and (*ii*) it must relate to the execution, discharge or satisfaction of the decree. If these conditions are fulfilled the question must be determined by the Court executing the decree and a separate suit will not lie.

In *Prosunno Kumar Sanyal* v. *Kali Das Sanyal*[1], the Privy Council, while pointing out that S. 244 of the Code of Civil Procedure, 1872, which corresponds to S. 47 of the present Code, contemplated a question between the parties to the suit with regard to the execution, discharge or satisfaction of the decree, observed that it did not necessarily follow that the question must be raised by a party to the suit. An auction-purchaser could have a question decided under S. 244 when the question raised was a question which affected the parties. The Board did not, however, consider the question whether an

1. (1892) L.R. 19 I.A. 166: I.L.R. 19 Cal. 683 (P.C.).

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auction-purchaser was a representative of the decree-holder or of the judgment-debtor.

There has been much controversy in this and other High Courts in India with regard to the question whether a stranger to a suit who purchases property at a Court auction in execution of a money decree must be regarded as a representative of a party. Owing to a conflict of decisions of this Court, Oldfield and Seshagiri Aiyar, JJ., in *Veyindramuthu Pillai* v. *Maya Nadan*[1], referred the following questions to a Full Bench:

"1. Whether a purchaser at a sale held in execution of a money decree is a representative of a party and, if so, of which party for the purpose of inquiry into a question relating to the execution of (*a*) that money decree, (*b*) any other decree affecting the purchased property and against the same judgment-debtor?

2. Whether a purchaser from a decree-holder purchaser under a money decree is a representative of a party for either of these purposes and, if so, of which?

3. Whether a stranger purchaser at a sale in execution of a mortgage decree is the representative of a party and, if so, of which?"

The Full Bench which was constituted to decide these questions was composed of Abdur Rahim, Officiating Chief Justice, and the two referring Judges. The learned Judges delivered separate judgments, but in no judgment were precise answers given to the questions referred, although the judgments of Oldfield and Seshagiri Aiyar, JJ., have been construed as holding that a stranger auction-purchaser in execution of a money decree must be regarded as a representative of the judgment-debtor. Abdur Rahim, Officiating Chief Justice, answered the question in this way:

"The law, therefore, in my opinion is that a person who has bought the property of the defendant in a suit since the institution of that suit, whether at a Court auction held in execution of a money decree passed in another suit or by private purchase, is entitled and bound to have any question relating to the execution, discharge or satisfaction of the decree decided under S. 47 by the Court executing the decree, when his interest is affected either by the decree itself or by the sale held in execution of that decree; and the same rule applies to a purchaser of the property under such sale, whether he is the decree-holder himself or a stranger. Whether the purchaser in the one case or the auction-purchaser in the other is to be regarded as the representative of the judgment-debtor or the decree-holder depends upon the nature of the question raised and who the contesting party is."

In a later case, *Yagnasami Aiyar* v. *Chidambaranatha Mudaliar*[2], the learned Officiating Chief Justice sitting with

1. (1919) 38 M.L.J. 32: I.L.R. 43 Mad. 107 (F.B.).
2. (1920) 13 L.W. 15.

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Odgers, J., expressly stated that the decision in *Veyindramuthu Pillai* v. *Maya Nadan*[1], may be taken as deciding that the auction-purchaser is a representative of the judgment-debtor.

Oldfield, J., held that the purchaser in execution of a money decree is ordinarily the representative of the judgment-debtor. Seshagiri Aiyar, J., expressly held that he was not the representative of the decree-holder, and left it to be inferred that he was the representative of the judgment-debtor. His answers to the questions referred were in these words:

> "I would therefore answer all the questions referred to us by saying that if the points for decision in an application before the executing Court relate to the rival rights of the decree-holder and of the judgment-debtor and also relate to execution, discharge or satisfaction of the decree, it should be dealt with in execution and not by separate suit. The right of appeal and second appeal will be governed by the same rules as affect applications under S. 47."

Notwithstanding the lack of precision in language used in the judgments it has been accepted by the parties concerned in the present reference that *Veyindramuthu Pillai* v. *Maya Nadan*[1] did put an end to the controversy whether a stranger auction-purchaser at a sale held in execution of a money decree is the representative of the judgment-debtor, and I see no reason to take a different view. All the right, title and interest of the judgment-debtor passes to the stranger auction-purchaser and therefore he stands in the shoes of the judgment-debtor. Different considerations may arise when a sale is held in pursuance of a mortgage decree as the mortgagee's interest has there to be considered, but it is not necessary to define the position of an auction-purchaser in such a case as here the Court is merely concerned with the position which arises when there has been a sale of the property attached under a decree for payment of money.

The contest in the suit out of which this reference arises is, as has been shown, between a stranger auction-purchaser in execution proceedings relating to a money decree and the purchasers in a private sale from the widow of the judgment-debtor. The judgment-debtor having died the property devolved on the widow. The conflict is merely one between persons claiming under the judgment-debtor and the decree-holder is in no way concerned with it. He has been paid his money and has disappeared from the proceedings. The

1. (1919) 38 M.L.J. 32: I.L.R. 43 Mad. 107 (F.B.).

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contest not being a contest between the parties to the suit or their representatives, but a contest between persons claiming under one of the parties, the case does not fall within the decision of the Judicial Committee in *Prosunno Kumar Sanyal* v. *Kali Das Sanyal*[1] and this being the position the dispute cannot be settled in an application under S. 47 of the Code of Civil Procedure. With this expression of opinion I will now proceed to answer the questions referred.

The answer which I give to the first question is that a stranger who purchases property at a Court auction held in execution of a money decree is not entitled to apply for possession as against the judgment-debtor or his representative in interest under S. 47. When the judgment-debtor or any one at his instigation resists or obstructs the auction-purchaser the latter must proceed in accordance with the provisions of O. 21, r. 97. The answer to the second question is directly in the negative. The aggrieved party's remedy in such a case is by way of suit.

These answers, in which my learned brothers concur, although my learned brother Patanjali Sastri bases his answer to the first question on different grounds, involve the overruling of the decisions in *Subbu Thayammal* v. *Chidambara Asari*[2], *Sorimuthu Pillai* v. *Muthukrishna Pillai*[3] and *Narasimha Aiyar* v. *Venkatachalapathi Aiyar*[4]. In *Subbu Thayammal* v. *Chidambara Asari*[2], Davies and Moore, JJ., held that an order refusing to recognise the transferee of a decree may, contest or no contest, for purposes of appeal, be regarded as an order passed under S. 244 of the Code of 1872. This was an application for execution by an assignee. It was objected to by an attaching creditor on the ground that the assignment was fraudulent. This was clearly not a contest between the parties to the suit or their representatives, but it was a contest between a stranger and a person who claimed to represent the decree-holder. In *Sorimuthu Pillai* v. *Muthukrishna Pillai*[3], Madhavan Nair, J., held that a contest between the auction-purchaser and the judgment-debtor fell within S. 47. The learned Judge refused to accept the decision of Abdur Rahim and Odgers, JJ., in *Yagnasami Aiyar* v. *Chidambaranatha Mudaliar*[5] and

1. (1892) L.R. 19 I.A. 166 : I.L.R. 19 Cal. 683 (P.C.).
2. (1901) I.L.R. 25 Mad. 383.
3. (1932) 65 M.L.J. 253 : I.L.R. 56 Mad. 808.
4. (1933) 67 M.L.J. 207 : I.L.R. 57 Mad. 457.
5. (1920) 13 L.W. 15.

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preferred to decide the case on the decision of Ayling and Krishnan, JJ., in *Jainulabdin Sahib* v. *Krishnan Chettiar*[1], in which it was held that a claim for the recovery of properties alleged to have been delivered to an auction-purchaser in excess of what was actually sold under a mortgage decree when the claim was raised by a defendant in a mortgage suit came within S. 47. The case before Madhavan Nair, J., was one relating to the execution of a money decree and *Jainulabdin Sahib* v. *Krishnan Chettiar*[1] was not really in point. The case which was in point was *Yagnasami Aiyar* v. *Chidambaranatha Mudaliar*[2] which was rightly decided. *Narasimha Aiyar* v. *Venkatachalapathi Aiyar*[3] is a decision of Beasley, C.J. and Bardswell, J. There the assignee of a decree applied for execution. This was opposed by his assignor. Therefore the contest was one between the decree-holder and his own representative. The learned Chief Justice considered that the case was governed by sub-S. 3 of S. 47. That sub-section merely states that where a question arises as to whether any person is or is not the representative of a party such question shall for the purposes of the section be determined by the Court. This sub-section cannot be held to affect the meaning of the words used in sub-S. (1). The contest was not between the parties to the suit or their representatives. The contest was between one party and another person who claimed to stand in his shoes. In *Subbu Thayammal* v. *Chidambara Asari*[4], *Sorimuthu Pillai* v. *Muthukrishna Pillai*[5], and *Narasimha Aiyar* v. *Venkatachalapathi Aiyar*[3], the true effect of S. 47 was not realized and these cases having been wrongly decided they cannot be allowed to stand.

The costs of this reference will be made costs in the appeal.

Pandrang Row, J.

Pandrang Row, J.—I agree with my Lord.

Abdur Rahman, J.

Abdur Rahman, J.—I agree.

Krishnaswami Aiyangar, J.

Krishnaswami Aiyangar, J.—I also agree. I may add that the answers given by my Lord the Chief Justice are substantially the same as those which were indicated by the referring Bench of which I was a member.

Patanjali Sastri, J.

Patanjali Sastri, J.—I agree with my Lord the Chief Justice that both the questions referred to the Full Bench

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1. (1921) 41 M.L.J. 120.
2. (1920) 13 L.W. 15.
3. (1933) 67 M.L.J. 207: I.L.R. 57 Mad. 457.
4. (1901) I.L.R. 25 Mad. 383.
5. (1932) 65 M.L.J. 253: I.L.R. 56 Mad. 808.

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should be answered in the negative, but as my answer to the first question rests upon different grounds, I am stating them in a judgment of my own.

As regards this question, it has to be observed that, though there has been considerable divergence of opinion among the other High Courts in India (see *Kailash Chandra Tarapdar* v. *Gopal Chandra Poddar*[1], *Bhagwati* v. *Banwari Lal*[2], *Hargovind Fulchand* v. *Bhudar Raoji*,[3] *Tribeni Prasad* v. *Ramasray Prasad*[4], this Court has consistently adhered to the view, notwithstanding doubts expressed in some of the cases, that where a decree-holder himself is the auction-purchaser, questions as to delivery of possession to him relate to the execution, discharge and satisfaction of the decree within the meaning of S. 47, and there is a catena of cases to that effect from *Muttia* v. *Appasami*[5], to the recent decision in *Krishna Aiyar* v. *Subramania Aiyar*[6]. Though none of them can be said to be binding on this Bench as it has been constituted, still as the question is merely one of procedure, it will not be desirable, as observed by my Lord, the Chief Justice, in the latest decision referred to above, to depart from this long course of decisions and upset what has been regarded in this presidency as a settled *cursus curiae* for over fifty years.

This consideration, however, does not apply to a stranger auction-purchaser seeking to obtain delivery of possession from a judgment-debtor or his representative, as there has been no such course of decisions settling the procedure in such a case. Indeed, I have not been able to find any decision of this Court holding that the question as to delivery of possession to a stranger auction-purchaser related to execution, discharge or satisfaction of the decree within the meaning of S. 47, except *Jainulabdin Sahib* v. *Krishnan Chettiar*[7], which relied, for this point, on two cases which, however, related to decree-holder purchasers. The point was raised in *Krishna Satapasti* v. *Saraswatula Sambasiva Rao*[8], but it was left open as unnecessary to decide in that case, as the learned Judges based their conclusion on other grounds. And, though one of the appeals

1. (1926) I.L.R. 53 Cal. 781 (F.B.). 2. (1908) I.L.R. 31 All. 82 (F.B.).
3. (1924) I.L.R. 48 Bom. 550 (F.B.). 4. (1931) I.L.R. 10 Pat. 670 (F.B.).
5. (1890) I.L.R. 13 Mad. 504.
6. (1939) 1 M.L.J. 468: I.L.R. (1939) Mad. 456 (F.B.).
7. (1921) 41 M.L.J. 120 at 122.
8. (1908) I.L.R. 31 Mad. 177.

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that came up before this Court in *Veyindramuthu Pillai* v. *Maya Nadan*[1], related to a stranger auction-purchaser seeking removal of obstruction by a person claiming under the judgment-debtor, it was there *assumed* by the referring Judges, without any discussion or consideration of the point, that the question as to delivery to such a person related to execution, discharge or satisfaction of the decree, and it was not among the questions referred to the Full Bench (*see* page 113); nor does it appear to have been considered by the Division Bench in their judgment finally disposing of the case after the Full Bench answered the reference (see *Veyindramuthu Pillai* v. *Maya Nadan*[2].)

It seems to me, therefore, necessary to examine whether the principle underlying the series of decisions applying S. 47 to a decree-holder purchaser seeking delivery of possession applies equally to a stranger auction-purchaser asking for similar relief. For, if it does there will be no reason why the latter should also not be held bound to follow the same settled procedure by way of an application under that section. On a careful consideration of these cases, however, I am clearly of opinion that the grounds on which they are based cannot reasonably be held to apply to the case of a stranger auction-purchaser whose position seems, for this purpose, to be essentially different from that of a decree-holder auction-purchaser. These decisions proceed on the ground that where a decree-holder himself purchases the property in Court auction, he cannot be regarded as having secured the full fruits of his decree until he obtains delivery of possession of the property purchased and the decree cannot be deemed to be completely *satisfied* until such delivery is obtained. Any steps, therefore, that he might take for obtaining such delivery must be deemed to be steps in furtherance of the execution of his decree. In one of the earliest cases of this Court, *Muttia* v. *Appaswami*[3], Muttuswami Aiyar, J., observes:

"I am unable to uphold the contention that the Court sale operated to *satisfy* the decree in O. S. No. 4 of 1882 and that a subsequent agreement regarding the purchase prior to the delivery of possession under S. 318 does not relate to the execution of the decree. The purchaser in this case was the decree-holder and the party obstructing the delivery of possession was a judgment-debtor, and the oral agreement set up in justification of the

1. (1919) 38 M.L.J. 32: I.L.R. 43 Mad. 107 (F.B.).
2. (1919) 39 M.L.J. 456: I.L.R. 43 Mad. 696.
3. (1890) I.L.R. 13 Mad. 504.

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obstruction prevents in effect the *completion of the purchase by transfer of possession.*"

(Italics mine).

Again at page 508, he observes:

"The application for delivery under S. 318 is substantially an application for execution of the decree by ordering delivery of possession of the property purchased."

The Calcutta High Court which, after some conflict, has settled down to the same view on this point by a majority of four to one in the Full Bench case in *Kailash Chandra Tarapadar* v. *Gopal Chandra Poddar*,[1] is equally clear as to the *ratio decidendi*. Chatterjea, A.C.J., observes at page 794:

"The property purchased represents the money for which he obtained his decree. It is to be observed that the decree-holder has to purchase with the permission of the Court, and under O. 21, r. 72, the purchase-money and the amount due on the decree may be set-off against one another. But the decree-holder does not actually get the benefit of the money due under his decree until he gets possession of the property of the judgment-debtor purchased by him."

In Bombay and Allahabad also, similar reasoning was employed in support of the same conclusion (see *Sadasiv Bin Mahadu Dhole* v. *Narayan Vithal Mawal*[2], and the dissenting judgment of Stanley, C.J., in *Bhagwati* v. *Banwari Lal*[3], though it is no longer the prevailing view in those provinces. (See *Hargovind Fulchand* v. *Bhudar Raoji*,[4] and *Bhagwati* v. *Banwari Lal*.[3]

Such being the *ratio decidendi* of the cases holding that questions as to delivery of possession to a decree-holder auction-purchaser relate to the execution, discharge or satisfaction of his decree, it cannot obviously apply to a case where a stranger purchases property in an execution sale. For, here, as soon as the sale is confirmed and the purchase-money is paid to the decree-holder, the debt due under the decree is satisfied *pro tanto* or in full, as the case may be, and so far as the property sold is concerned, the execution is at an end. The fruits of his decree have been secured whether or not the auction-purchaser obtains delivery of possession of the property brought to sale. On the other hand, the purchaser, provided he purchases *bona fide*, is not affected by any subsequent variation or even reversal of the decree (see *Zainul-Abdin Khan* v. *Mahomed Asghar Ali Khan*.[5] It seems to me, therefore, to follow that questions as

1. (1926) I.L.R. 53 Cal. 781 (F.B.).
2. (1911) I.L.R. 35 Bom. 452 at 459.
3. (1908) I.L.R. 31 All. 82 (F.B.).
4. (1924) I.L.R. 48 Bom. 550 (F.B.).
5. (1887) L.R. 15 I.A. 12: I.L.R. 10 All. 166 (P.C.).

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to delivery of possession to a stranger purchaser cannot be said to relate to execution, discharge or satisfaction of the decree.

Though, as observed already, there appears to be no case in this Court in which the question can be said to have been considered in relation to a stranger auction-purchaser, the Calcutta High Court, which takes the same view as this Court as regards a decree-holder purchaser, has recognised this well-marked distinction between a decree-holder purchasing property in execution of his own decree and a stranger auction-purchaser, and has consistently refused to apply S. 47 to a case where the latter seeks delivery of possession of the property. It is enough in this connection to refer to the observation of Chakravarti, J., in *Kailash Chandra Tarapdar* v. *Gopal Chandra Poddar*[1]:—

"So far as this question is concerned, I think there is a long series of decisions of this Court in which the distinction between the decree-holder auction-purchaser and a third party auction-purchaser has been well maintained."

Similarly in Bombay, when the prevailing view as regards a decree-holder purchaser was the same as in Madras, the case of a stranger purchaser was held to be distinguishable. (See *Ramchandra Vithal* v. *Gajanan Narayan*[2].) For these reasons I hold that the question of delivery of possession to a stranger auction-purchaser does not relate to the execution, discharge or satisfaction of the decree" within the meaning of S. 47 of the Code of Civil Procedure.

Though this view renders unnecessary the consideration of the further point, also involved in the first question referred, as to whether a stranger auction-purchaser is a representative of the decree-holder or of the judgment-debtor within the meaning of S. 47, as I consider that in a case like this he is to be regarded as the representative of the decree-holder, I shall briefly indicate the grounds on which I base my opinion. The question is by no means free from difficulty, as can be seen from the numerous conflicting decisions upon it, and it is not without regret that I differ from my Lord, the Chief Justice and my learned brothers whose opinion, I need hardly say, I have respectfully considered.

The answer, which, in my opinion, is the right one, cannot be put more tersely than in the words of the learned Judges in

1. (1926) I.L.R. 53 Cal. 781 (F.B.).
2. (1919) I.L.R. 44 Bom. 352 at 364.

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Krishnabhupati Devu v. *Vikrama Devu*[1]:

"A purchaser in a Court sale represents the judgment-debtor to the extent of such right, title and interest as he had in the property purchased at the date of sale, and represents the execution creditor, in so far as he had a right to bring such right, title and interest to sale in satisfaction of his decree".

Whether in a particular case he represents the one or the other depends (as observed by Abdur Rahim, O. C. J., in *Veyindramuthu Pillai* v. *Maya Nadan*[2],) upon the nature of the question raised and who the contesting party is. In the present case, having regard to the nature of the dispute which relates to the superior title claimed by the appellant under a Court sale as against respondents 1 to 3 who have purchased the property under a private sale from the judgment-debtor's widow pending attachment, it seems to me that the appellant can and should be regarded as the representative of the decree-holder. The position is this: The judgment-debtor having already sold the property to respondents 1 to 3, the appellant who purchased only the right, title and interest of the judgment-debtor, at the Court sale would get nothing under the sale but for the protection afforded by S. 64 of the Code of Civil Procedure to a decree-holder executing his decree. That section, it will be observed, does not render an alienation pending attachment void against all persons and for all purposes, but only against a "claim enforceable under the attachment", that is, against the decree-holder's right to bring the property to sale under his attachment unaffected by any alienation by the judgment-debtor subsequent to such attachment. (*See* the observations of the Privy Council in *Dinendronath Sannyal* v. *Ramcoomar Ghose*[3], on S. 240 of the Code of Civil Procedure of 1859 which was in even wider terms than S. 64.) The appellant cannot therefore claim to treat the purchase of respondents 1 to 3 as a nullity except by invoking this right of the decree-holder under S. 64 of the Code of Civil Procedure, and, to this extent and for this purpose, the appellant can and should, in my opinion, be treated as claiming under or representing the decree-holder.

Now, the term "representative" is not defined in the Code. It has been held that it is a term of wider import than "legal representative" as defined in S. 2 (11) of the Code and means

1. (1894) I.L.R. 18 Mad. 13 at 18.
2. (1919) 38 M.L.J. 32: I.L.R. 43 Mad. 107 at 124 (F.B.).
3. (1880) L.R. 8 I.A. 65 at 75: I.L.R. 7 Cal. 107.

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"a representative in interest". (See *Ishan Chunder Sirkar* v. *Beni Madhub Sirkar*[1].) Does it, however, necessarily import, as a condition of its application, a transmission of interest *in property*, or does it merely connote standing in the place of another for the purpose of deriving some right or advantage from him. The latter is undoubtedly the ordinary meaning of the term and it is commonly used in a variety of contexts which do not involve the idea of any interest in property passing. In the absence of any indication in S. 47 that the term is used in a more restricted sense, there seems to my mind to be no reason why it should not be understood in its ordinary meaning referred to above. Indeed, there is authority for the view that even the expression "legal representative" notwithstanding the terms of its definition referring to the devolution of an estate, can appropriately be applied to cases where there is and can be no transmission of interest in property. Dealing with the claim of a remoter reversioner to be substituted in the place of the deceased presumptive reversioner who had brought a suit for a declaration that an adoption made by a widow was invalid, their Lordships observed in *Venkatanarayana* v. *Subbammal*[2]:

> "The phraseology of sub-S. (11), in their Lordships' opinion, is fairly open to the contention that the suit was brought by the deceased plaintiff as representing, in his *reversionary* right, the estate of the last male owner, and that on his death such *right* devolved on the petitioner."
>
> (Italics mine).

It is, of course, plain that the right here referred to is not an interest in property as a reversioner, presumptive or remote, has only a *spes successionis*. I am therefore of opinion that the term "representative" in S. 47 of the Code of Civil Procedure should be understood as merely referring to one who stands in the shoes of another—to use an expression familiar in legal parlance—and as meaning more or less the same thing as the expression "claiming under" in other sections of the Code, for example, Ss. 11 and 146.

The conclusion that a stranger auction-purchaser should, in certain circumstances, be regarded as representing and claiming under the decree-holder who brought the property to sale derives support from decisions on closely analogous subjects, in

1. (1896) I.L.R. 24 Cal. 62 (F.B.).
2. (1915) 28 M.L.J. 535: L.R. 42 I.A. 125: I.L.R. 38 Mad. 406 at 413 (P.C.).

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the wider perspective of which the question now under consideration should, as it seems to me, be viewed. In the well-known case in *Sarat Chunder Dey* v. *Gopal Chunder Laha*[1], the question arose whether a purchaser in execution of a mortgage decree obtained by a mortgagee from a person who had no title to the property but whose mortgage had to be upheld as valid by estoppel against the true owner, could avail himself of such estoppel in a question with a private purchaser from the true owner even though the auction-purchaser was fully aware, at the time of his purchase, that the mortgagor had no title to the property. Their Lordships observed at page 215:

"And their Lordships must further observe that, as the mortgage was effectual as a valid title to *Kahimuddin*, the lender, under which in default of payment of the money lent, he was entitled to sell the property, it follows that any purchaser from him under a sale regularly carried out would acquire a valid title to the property, even though he were fully aware of all the circumstances which had attended the execution of the hiba and that it had been originally invalid."

It was, no doubt, a case of an auction-purchaser in execution of a mortgage decree and it has been suggested in some decisions that such a purchaser derives the rights of both the mortgagor and the mortgagee and can thus be regarded as the representative of the decree-holder also. Assuming, that such a distinction is valid (as to which, however, see the observations in *Jainulabdin Sahib* v. *Krishna Chettiar*[2]), I am unable to read the decision of their Lordships as proceeding upon any such narrow ground. Their reasoning, as is clear from the passage quoted above, was that the mortgagee-decree-holder was entitled, by virtue of the estoppel, to sell the property validly as against the true owner and that, therefore, the purchaser at the sale in enforcement of that right was really purchasing the property 'from him', and thus acquired a good title, by the same estoppel, against the true owner although he (the purchaser) was actually aware of the circumstances. In other words, their Lordships regarded the execution purchaser as one claiming under or representing the decree-holder, in so far as the latter had the right to sell the property validly through Court against the true owner in satisfaction of his decree. The principle is, to my mind, equally applicable to an auction-purchaser in

1. (1892) L.R. 19 I.A. 203: I.L.R. 20 Cal. 296 (P.C.).
2. (1921) 41 M.L.J. 120 at 123.

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execution of a money decree where the decree-holder has also a right to bring the property to sale, by virtue of his attachment and the operation of S. 64, unaffected by the title having become vested in an alienee from the judgment-debtor before the execution sale.

In this connection I may refer to the distinction pointed out by their Lordships of the Privy Council between a private sale and an execution sale. Their Lordships observed:

"In the former the price is fixed by the vendor and purchaser alone; in the latter the sale must be made by public auction conducted by a public officer of which notice must be given as directed by the Act, and at which the public are entitled to bid. Under the former the purchaser derives title through the vendor, and cannot acquire a better title than that of the vendor. Under the latter, the purchaser, notwithstanding he merely acquires the right, title and interest of the judgment-debtor, acquires that title by operation of law adversely to the judgment-debtor, and freed from all alienations or incumbrances effected by him subsequently to the attachment of the property sold in execution". (See *Dinendronath Sanyal* v. *Ramçoomar Ghose*[1].)

These observations and the remark in *Sarat Chunder Dey* v. *Gopal Chunder Laha*[2], that the auction-purchaser was purchasing the property from the mortgagee in so far as the latter was seeking to enforce his right to sell through Court in the mortgage suit, show the existence of what has been called the 'privity in law' between the decree-holder and the auction-purchaser.

The decision in *Krishnabhupathi Devu* v. *Vikrama Devu*[3], furnishes another illustration of circumstances where a stranger auction-purchaser in execution of a money decree can appropriately be held to be the representative of the decree-holder. The defendant in that case had attached certain properties of his judgment-debtor in execution of a money decree. The plaintiff intervened with a claim based upon a gift deed executed in his favour by the judgment-debtor but his claim was disallowed. He thereupon sued the decree-holder to have his title recognised and the property released from attachment and the suit was dismissed on the ground that the gift was inoperative. The property was subsequently brought to sale on account of that decree as well as three other decrees held by the same decree-holder, and it was purchased by a third party. The plaintiff then brought the suit (out of which the case in

1. (1880) L.R. 8 I.A. 65 at 75: I.L.R. 7 Cal. 107 (P.C.).
2. (1892) L.R. 19 I.A. 203: I.L.R. 20 Cal. 296 (P.C.).
3. (1894) I.L.R. 18 Mad. 13.

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the wider perspective of which the question now under consideration should, as it seems to me, be viewed. In the well-known case in *Sarat Chunder Dey* v. *Gopal Chunder Laha*[1], the question arose whether a purchaser in execution of a mortgage decree obtained by a mortgagee from a person who had no title to the property but whose mortgage had to be upheld as valid by estoppel against the true owner, could avail himself of such estoppel in a question with a private purchaser from the true owner even though the auction-purchaser was fully aware, at the time of his purchase, that the mortgagor had no title to the property. Their Lordships observed at page 215:

"And their Lordships must further observe that, as the mortgage was effectual as a valid title to *Kalimuddin*, the lender, under which in default of payment of the money lent, he was entitled to sell the property, it follows that any purchaser from him under a sale regularly carried out would acquire a valid title to the property, even though he were fully aware of all the circumstances which had attended the execution of hiba and that it had been originally invalid."

It was, no doubt, a case of an auction-purchaser in execution of a mortgage decree and it has been suggested in some decisions that such a purchaser derives the rights of both the mortgagor and the mortgagee and can thus be regarded as the representative of the decree-holder also. Assuming, that such a distinction is valid (as to which, however, see the observations in *Jainulabdin Sahib* v. *Krishna Chettiar*[2]), I am unable to read the decision of their Lordships as proceeding upon any such narrow ground. Their reasoning, as is clear from the passage quoted above, was that the mortgagee-decree-holder was entitled, by virtue of the estoppel, to sell the property validly as against the true owner and that, therefore, the purchaser at the sale in enforcement of that right was really purchasing the property 'from him', and thus acquired a good title, by the same estoppel, against the true owner although he (the purchaser) was actually aware of the circumstances. In other words, their Lordships regarded the execution purchaser as one claiming under or representing the decree-holder, in so far as the latter had the right to sell the property validly through Court against the true owner in satisfaction of his decree. That principle is, to my mind, equally applicable to an auction-purchaser in

1. (1892) L.R. 19 I.A. 203: I.L.R. 20 Cal. 296 (P.C).
2. (1921) 41 M.L.J. 120 at 123.

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execution of a money decree who has also a right to bring the property to sale, by virtue of his attachment and the operation of S. 64, unaffected by the title having become vested in an alienee from the judgment-debtor before the execution sale.

In this connection I may refer to the distinction pointed out by their Lordships of the Privy Council between a private sale and an execution sale. Their Lordships observed:

> "In the former the price is fixed by the vendor and purchaser alone; in the latter, the sale must be made by public auction conducted by a public officer of which notice must be given as directed by the Act, and at which the public are entitled to bid. Under the former the purchaser derives title through the vendor, and cannot acquire a better title than that of the vendor. Under the latter, the purchaser, notwithstanding he merely acquires the right, title and interest of the judgment-debtor, acquires that title by operation of law adversely to the judgment-debtor, and freed from all alienations or incumbrances effected by him subsequently to the attachment of the property sold in execution". (See *Dinendronath Sanyal* v. *Ramcoomar Ghose*[1].)

These observations and the remark in *Sarat Chunder Dey* v. *Gopal Chunder Laha*[2], that the auction-purchaser was purchasing the property from the mortgagee in so far as the latter was seeking to enforce his right to sell through Court in the mortgage suit, show the existence of what has been called the 'privity in law' between the decree-holder and the auction-purchaser.

The decision in *Krishnabhupathi Devu* v. *Vikrama Devu*[3], furnishes another illustration of circumstances where a stranger auction-purchaser in execution of a money decree can appropriately be held to be the representative of the decree-holder. The defendant in that case had attached certain properties of his judgment-debtor in execution of a money decree. The plaintiff intervened with a claim based upon a gift deed executed in his favour by the judgment-debtor but his claim was disallowed. He thereupon sued the decree-holder to have his title recognised and the property released from attachment and the suit was dismissed on the ground that the gift was inoperative. The property was subsequently brought to sale on account of that decree as well as three other decrees held by the same decree-holder, and it was purchased by a third party. The plaintiff then brought the suit (out of which the case in

1. (1880) L.R. 8 I.A. 65 at 75: I.L.R. 7 Cal. 107 (P.C.).
2. (1892) L.R. 19 I.A. 203: I.L.R. 20 Cal. 296 (P.C.).
3. (1894) I.L.R. 18 Mad. 13.

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Krishnabhupathi Devu v. *Vikrama Devu*[1], arose) against this auction-purchaser for a declaration of the validity of the same gift which he failed to obtain in his earlier suit against the decree-holder, and the question arose whether the finding in the previous suit was *res judicata*. The learned Judges, Muttuswami Aiyar and Best, JJ., held that it was and observed at page 18:

"It is a well-known principle that a purchaser at a Court sale represents the judgment-debtor to the extent of such right, title and interest as he had in the property purchased at the date of sale, and represents the execution creditor, in so far as he had a right to bring such right, title and interest to sale in satisfaction of his decree. Hence it follows that the purchaser is a party claiming in this case under the execution creditor, Ramamurthi, within the meaning of S. 13, and the Judge has apparently overlooked the privity in law which exists between the two. The decision in *Sarat Chunder Dey* v. *Gopal Chunder Laha*[2], is a clear authority for the proposition that when the plea of estoppel is available to a decree-holder, it is likewise available to the purchaser at the execution sale as his representative or as one claiming under him."

The learned Judges no doubt proceeded to distinguish certain cases as decisions relating to S. 244 of the Code of Civil Procedure (corresponding to S. 47), but I respectfully share the inability of Abdur Rahim, O. C. J., in *Veyindramuthu Pillai* v. *Maya Nadan*[3], to see why the principle should not be applied to S. 47 of the Code as well. It is open to this Bench, of course, to say that the decision in *Krishnabhupathi Devu* v. *Vikrama Devu*[1] is wrong, but it seems to me, if I may say so, to be unquestionably good sense and good law; for, it would be an inconvenient state of the law, if it were found necessary, after a decree-holder establishes his right to sell certain properties as belonging to his judgment-debtor and free of the claim put forward by a third party, in a litigation which may extend over years and pass through several Courts, that the execution purchaser has to go through the same process all over again against the same party in respect of the same claim.

On the other hand, the decision in *Srinivasa Aiyangar* v. *Vellayyan Ambalam*[4] shows that it might not be correct, in certain circumstances and for certain purposes, to hold that an execution purchaser is a representative of the judgment-debtor, though he gets the right, title and interest of the

1. (1894) I.L.R. 18 Mad. 13.
2. (1892) L.R. 19 I.A. 203: I.L.R. 20 Cal. 296 (P.C.).
3. (1919) 38 M.L.J. 32: I.L.R. 43 Mad. 107 at 122 (F.B.).
4. (1926) 51 M.L.J. 143.

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latter at the execution sale. A certain property was purchased by the plaintiff in that case in execution of a money decree. It had been attached before the Court sale, and during the pendency of the attachment, there was an usufructuary mortgage by the judgment-debtor to the defendant. Nearly 27 years after the purchase, the purchaser brought the suit for redeeming the mortgage on the ground that the defendant was only a mortgagee and that he (the purchaser) being the owner of the equity of redemption, was entitled to redeem the property. The purchaser, it will be noted, did not claim to treat the mortgage as void, though he was entitled to do so, as it was effected pending attachment. He was content, evidently in order to get over the bar of limitation, to take up the position that it was a valid mortgage and that he purchased only the equity of redemption. In other words, he asked to be treated as one standing in the shoes of the judgment-debtor, that is, as his representative, and to be allowed to redeem the property on that footing, even as the judgment-debtor would be entitled to do if he continued to be the owner. But the Court rejected his prayer and dismissed the suit, holding, on the strength of the observations of the Privy Council in *Dinendronath Sanyal* v. *Ramcoomar Ghose*[1], that there was no privity between him as the execution purchaser and the defendant as the mortgagee from the judgment-debtor.

For these reasons, I am inclined to hold that the appellant in this case is to be regarded as the representative of the decree-holder within the meaning of S. 47 of the Code of Civil Procedure.

On the second question referred, I agree with the judgment of my Lord, the Chief Justice, which I have had the advantage of reading and have nothing material to add.

Reference answered.

[The division bench (*Krishnaswami Aiyangar and Somayya, JJ.*) then dealt with the appeal after calling for findings from the Court below.]

K. S.

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1. (1880) L.R. 8 I.A. 65: I.L.R. 7 Cal. 107 (P.C.).

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, MR. JUSTICE KING AND MR. JUSTICE PATANJALI SASTRI.

Minor Ramachandra by next friend K. L. Bhandary, Vakil, Kundapur.. *Petitioner** (*Plaintiff*)

v.

Minor Shantarama by mother and guardian Rukmini Amma and another. *Respondents* (*Defendants*).

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Limitation Act (IX of 1908), S. 20—Mortgagee directed to discharge mortgagor's debt due on a promissory note—If 'agent duly authorised' to make part payment of principal or interest to save limitation under S. 20.

A person liable to pay a debt due under a promissory note directed his mortgagee to discharge the debt from out of the mortgage consideration. The mortgagee made two payments on 29th May, 1933 and 16th July, 1934, towards interest and duly endorsed the payments on the promissory note, but failed to pay the balance. In a suit on the promissory note filed within three years from the last of such endorsements,

Held (Patanjali Sastri, J., dissenting), that an authority to discharge a debt does not include an authority to make part payments and keep alive the debt and the suit is barred by limitation.

Alagappa Chettiar v. *Subramania Pandia Thevar*, (1914) 26 M.L.J. 509 and *Thinnappa Chettiar* v. *Krishna Rao*, (1940) 2 M.L.J. 726 approved.

National Bank of Upper India v. *Bansidhar*, (1929) L.R. 57 I.A. 1: I.L.R. 5 Luck. 1 (P.C.), distinguished.

Petition under S. 25 of Act IX of 1887 praying that the High Court will be pleased to revise the decree of the Court of the District Munsif of Kundapur dated 18th December, 1936, in S. C. S. No. 381 of 1936.

K. Sanjiva Kamath for Petitioner.

K. Vittal Rao for Respondents.

The petition came on for hearing on 30th August, 1940, before *Patanjali Sastri, J.* who made the following

ORDER: *Patanjali Sastri, J.*—This is a petition to revise the decree of the Court of the District Munsif of Kundapur dismissing the petitioner's small cause suit No. 381 of 1936 as barred by limitation.

The suit was brought to recover the amount due on a promissory note executed by the first respondent's father on 30th

* C. R. P. No. 579 of 1937. 16th October, 1940.

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September, 1926. After his death in 1932, the first respondent's guardian executed a mortgage on 20th December, 1932, in favour of the second respondent's husband who was directed to discharge the suit debt as part of the consideration for the mortgage. The mortgagee made payments for interest on 29th May, 1933, and 16th July, 1934, which were duly endorsed on the promissory note, but failed to pay the balance of the debt. The suit was instituted in 1936 for the recovery of such balance and it was not disputed that it would be in time if the second payment of interest referred to above satisfied the requirements of S. 20 of the Limitation Act. The Court below held that it did not, on the ground that the mortgagee was neither the person liable to pay the debt nor his agent duly authorised to make such payment within the meaning of S. 20. An attempt was made in the Court below to show that there was a novation by petitioner accepting the liability of the mortgagee but the Court held that it was not proved and that finding could not be and was not attacked before me in revision.

The view taken by the lower Court on both points is supported by a recent decision of a Division Bench of this Court reported in *Thinnappa Chettiar v. Krishna Rao*[1] and this would ordinarily have concluded the case in favour of the respondents but for the submission of the learned counsel for the petitioner with which I am inclined to agree that the decision requires reconsideration on the question of authority to pay in view of the Privy Council ruling reported in *National Bank of Upper India* v. *Bansidhar*[2]. The facts of that case so far as they are material here are as follows: One Bishambar who was a director of a bank obtained an unauthorised loan from it, but wishing to conceal from the Bank his indebtedness persuaded one Bansidhar, the first respondent before their Lordships, to execute a promissory note for the amount due on the understanding that he (Bishambar) himself would discharge the debt. The amount of the note was accordingly credited to Bishambar, and Bansidhar was shown in the books as the bank's debtor in respect of that sum. Bishambar made a payment for interest, and within three years from such payment, but beyond three years from the note, the Bank sued Bansidhar to recover the balance due. In holding that Bishambar's payment of interest saved the suit from the bar of limitation, their Lordships observed at page 9:—

"Upon what they have already held to be the true meaning and effect of the transaction of the 22nd of December 1917, it was agreed between Bishambar and the first respondent that the former would discharge the latter's debt to the bank in respect of both principal and interest, and it is

1. (1940) 2 M.L.J. 726.
2. (1929) L.R. 57 I.A. 1: I.L.R. 5 Luck. 1 (P.C.).

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clear from the first respondent's evidence that he left it to Bishambar to do so. Under these circumstances, it being admitted that no formal authorization of the agent is required under this section, their Lordships find no difficulty in implying authority from the first respondent to Bishambar to pay the interest on his behalf as it became due."

As pointed out already, the position under the mortgage transaction in the present case is, to my mind, essentially the same as the mortgagee had undertaken, and the mortgagor had left it to him, to discharge the petitioner's debt, and there is nothing to show that it was required to be discharged by a single payment. The same conclusion must therefore follow.

In taking the opposite view, the learned Judges in *Thinnappa Chettiar* v. *Krishna Rao*[1], followed the earlier decision in *Alagappa Chettiar* v. *Subramania Pandia Thevar*[2], where the learned Judges purported to base their decision on the English case *Linsell* v. *Bonsor*[3]. The defendant in that case entered into a composition deed and instructed one of his trustees to tender to the plaintiff a part of the debt in discharge of the whole. The plaintiff having refused to accept it on those terms, the trustee paid it as a part payment. It was held that such payment in part was without authority and did not take the case out of the statute of limitations. With all respect, it seems to me that this case does not lend support for the broad proposition that authorization to discharge a debt can confer no authority to pay interest or part of the principal due on the debt. It will be observed that all that S. 20 requires is that the payment should be made by a person paying for the debtor and on his account what he is bound to pay and not by a stranger to the debtor (*see* per Lord Cranworth in *Chinnery* v. *Evans*[4]) and such authority can be irrespective of the volition of the debtor (see *Govindaswami Pillai* v. *Dasai Goundan*[5]). It is therefore difficult to see why the mortgagee whom the debtor had asked to pay off the petitioner's debt should not be considered to be duly authorised to pay interest or part of the principal of the debt.

The other cases to which reference is made in *Thinnappa Chettiar* v. *Krishna Rao*[1] have merely followed the decision in *Alagappa Chettiar* v. *Subramania Pandia Thevar*[2]. Of these cases only *Subbakka* v. *Venkata Setti*[6] and *Thinnappa Chettiar* v. *Krishna Rao*[1], are later than the Privy Council decision in

1. (1940) 2 M.L.J. 726.
2. (1914) 26 M.L.J. 509.
3. (1835) 2 Bing. (N.C.) 241: 132 E.R. 95.
4. (1864) 11 H.L.C. 115: 11 E.R. 1274.
5. (1921) 41 M.L.J. 423: I.L.R. 44 Mad. 971.
6. (1932) M.W.N. 1193.

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National Bank of Upper India v. *Bansidhar*[1]. No reference was, however, made to this decision in the former, and though it was noticed in passing by the learned Judges in the latter in discussing the other question whether the mortgagee in that case was a person liable to pay the debt within the meaning of S. 20, its bearing on the question of implied agency was apparently overlooked, for no reference is made to it in the discussion of that point at pages 456 and 457 of the report.

For the reasons indicated above, I consider that the question whether the mortgagee who undertakes as a part of the consideration for the mortgage to discharge a debt of the mortgagor not charged on the properties mortgaged, and pays a certain sum for interest on the debt is a person duly authorised to make such payment within the meaning of S. 20 of the Limitation Act requires reconsideration in the light of the decision of the Privy Council in *National Bank of Upper India* v. *Bansidhar*[1] and I therefore direct that the case be placed before my Lord the Chief Justice to be posted before a Full Bench for disposal.

This petition coming on for hearing this day before the Full Bench,

The Court delivered the following

Leach, C. J.

JUDGMENTS: *The Chief Justice.*—This petition appeared originally in the list of Patanjali Sastri, J., but he adjourned the hearing under the provisions of r. 1 of the Appellate Side Rules of this Court in order that the petition might be determined by a Bench. The learned Judge was of the opinion that the judgment of the Privy Council in *National Bank of Upper India* v. *Bansidhar*[1], called for the reconsideration of the decision of this Court in *Thinnappa Chettiar* v. *Krishna Rao*[2] and of a number of earlier decisions to the effect that a power to pay off a debt does not carry with it a power to keep the debt alive by a payment of interest or part payment of principal. The petition has been placed before a Full Bench at my direction under r. 6 in order that there may be greater freedom of action if necessary.

S. 20 of the Limitation Act provides that a payment of interest or a payment in part of principal by the person liable to pay the debt or by an agent duly authorised in this behalf starts a fresh period of limitation from the date of payment, provided

1. (1929) L.R. 57 I.A. 1: I.L.R. 5 Luck. 1 (P.C.).
2. (1940) 2 M.L.J. 726

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that the acknowledgment appears in the handwriting of or in a writing signed by the person making the payment. In *Thinnappa Chettiar* v. *Krishna Rao*[1], Venkataramana Rao, J., pointed out that under this section the agent whose payment would keep alive the debt must be one who is duly authorized to make the part payment of interest or principal and that this Court has consistently taken the view that a direction to discharge a debt does not make the donee of the power an agent authorized to make a part payment so as to keep the debt alive. In this connection Venkataramana Rao, J., referred to *Chidambaram Pillai* v. *Veerappa Chettiar*[2], *Alagappa Chettiar* v. *Subramania Pandia Thevar*[3], *Balaguruswami Naicken* v. *Guruswami Naicken*[4], *Ramaswami Pillai* v. *Kasinatha Aiyar*[5] and *Subbakka* v. *Venkata Setti*[6].

It is not necessary to discuss all the decisions of this Court. I consider that it will be sufficient to state the position in *Alagappa Chettiar* v. *Subramania Pandia Thevar*[3], where the facts were very like the facts in the present case. There, a mortgagee undertook to discharge a debt due by the mortgagor and retained in his hands sufficient of the mortgage consideration to discharge the debt. Instead of paying off the mortgage he retained the whole of the money for nearly two years and then only paid the interest due on the debt. The question was whether in these circumstances, it could be said that he was authorized to pay the interest on the bond so as to keep alive the mortgagor's liability to the creditor. It was held that he had authority to pay the debt in full, but no authority to make a payment of interest so as to bring the case within S. 20 of the Indian Limitation Act. The learned Judges (Wallis and Sadasiva Aiyar, JJ.) relied on *Linsell* v. *Bonsor*[7], where the defendant, a trustee under a deed of composition, was instructed to tender to the plaintiff a part of the debt in discharge of the whole. The plaintiff refused to accept the money on this basis and it was then tendered and accepted as a payment in part. It was held that there was no authority for this and the part payment did not prevent the law of limitation operating.

1. (1940) 2 M.L.J. 726.
2. (1917) 6 L.W. 640.
3. (1914) 26 M.L.J. 509.
4. (1924) 48 M.L.J. 506.
5. (1927) M.W.N. 356.
6. (1932) M.W.N. 1193.
7. (1835) 2 Bing. (N.C.) 241: 132 E.R. 95,

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In the *National Bank of Upper India* v. *Bansidhar*[1], the facts were these. A director of the bank, Bishambar Nath by name, induced the manager of the bank to allow him a large overdraft, but as the half-yearly audit was approaching it was deemed advisable to eliminate this debt from the books. With this object in view the director persuaded the first respondent in the appeal to execute in favour of the bank a promissory note for the amount and the bank manager to accept it in discharge of the overdraft. The arrangement between the director and the maker of the promissory note was that the director should himself pay the principal and interest. Twelve months after this arrangement was entered into, the director paid to the bank a sum out of which the bank allocated Rs. 908 to the payment of interest then due upon the promissory note. The director had notice of the allocation and made an appropriate entry in his own books. The question which arose for decision was whether this payment of interest saved limitation as against the maker of the note and it was held that it did. The director was authorized to discharge the debt due by the maker of the promissory note to the bank in respect of both principal and interest and the director was left to do this as it best suited him. He had not the money to do it there and then. Under these circumstances, the Judicial Committee had no difficulty in finding an authority from the maker of the promissory note to the director to pay the interest on his behalf as it became due.

This decision of the Privy Council does not travel beyond the particular facts of the case, and in my opinion it cannot be read as an authority for the proposition that where a mortgagee undertakes as part of the consideration for the mortgage to discharge a debt due by the mortgagor he must be deemed to have authority to make a payment of interest or a part payment of principal. I consider that the judgment of the Judicial Committee leaves entirely unaffected the decision in *Alagappa Chettiar* v. *Subramania Pandia Thevar*[2] and the earlier decisions of this Court on the point. Whether there is authority to make a part payment is a question of fact and the decision in each case must depend upon the particular facts. Of course, where the person who is to make the payment is left a discretion in the matter his principal will have to suffer the consequences

1. (1929) L.R. 57 I.A. 1: I.L.R. 5 Luck. 1 (P.C.).
2. (1914) 26 M.L.J. 509.

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of a payment to account, if the conditions of S. 20 for the saving of limitation are also complied with.

Turning to the facts of the case now before us, on the 30th September, 1926, the first respondent's father executed a promissory note in favour of the mother of the petitioner for a sum of Rs. 100. In 1930, the mother died and as the petitioner was a minor a guardian of his property was appointed. On the 20th December, 1932, the first respondent's mother as his guardian, his father being dead, executed a usufructuary mortgage of certain lands in favour of the husband of the second respondent. The consideration for this mortgage was the sum of Rs. 475. The mortgage deed provided that the mortgagee should discharge the promissory note executed in favour of the petitioner's mother. The direction to the mortgagee was that he was to make payment in full and the District Munsif who tried the suit out of which this petition arises has held that the mortgagee had no authority to make a part payment on behalf of the promisor so as to keep the debt alive. On the 29th May, 1933, the mortgagee made a payment of Rs. 8-10-0 on account of interest and an acknowledgment of the payment was endorsed on the promissory note. On the 16th July, 1934, he made a payment of one rupee on account of principal and Rs. 7-1-0 on account of interest and acknowledgments of these payments were also endorsed on the promissory note. A suit was filed on the instrument on the 18th June, 1936, but by then it was time barred, unless the payment made on the 16th July, 1934, could be regarded as having been made by the mortgagee as the agent of the maker of the promissory note duly authorized in that behalf. The District Munsif held that the mortgagee could not be so regarded and I have no hesitation in concurring in his decision. There was no discretion given to the mortgagee in the matter at all. His duty was to discharge the promissory note in full and he had no authority to do anything else. He did not carry out the duty of his agency but did something quite beyond what he was expected to do. Therefore the maker of the promissory note was not bound by his action and the suit was rightly dismissed.

It follows that in my opinion the petition should be dismissed with costs.

King, J.

King, J.—I agree with my Lord that for the reasons which he has given this Revision Petition should be dismissed and I

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wish to add just a few words. Whether an agent has been duly authorised within the meaning of S. 20 to make a particular payment is a question of fact. Here, I take it, the facts are simple. There was an authorisation in general terms to the mortgagee to pay off the promissory note debt. No time limit was set. The District Munsif held that the meaning of this authorisation was that the mortgagee should pay off the debt in full and with reasonable promptitude. The petitioner here can succeed in my opinion only if he can show that on these facts no other interpretation of the mortgagor's instructions is in law possible than that the mortgagee was given full discretion to pay off the debt as and when he pleased. As my Lord has said, I do not think that the Privy Council in *National Bank of Upper India* v. *Bansidhar*[1] lays down any such general proposition. On the facts in that case the conclusion that Bishambhar was authorised to discharge Bansidhar's debt as and when he could was inevitable. But in the absence of unusual facts it appears to me that the plain and ordinary meaning of a direction as part of the consideration for a mortgage to discharge a debt is a direction to discharge it in full and to discharge it quickly. What are the facts here? The mortgagor is in need of money and applies to the mortgagee who presumably has money to lend him. He borrows Rs. 475. About Rs. 100 of this sum is not to be paid in cash, but is to be paid to the creditor under the promissory note. How can it be presumed in law that when in these circumstances the mortgagor directs the mortgagee to pay off this comparatively insignificant debt, he has impliedly authorised him to spend eighteen months in paying off the paltry sum of Rs. 15-11-0? Such a conclusion seems to me to be repugnant to common sense. I am accordingly of opinion that the District Munsif was entitled on the evidence to hold that the authorisation to the mortgagee was for the complete and speedy discharge of the debt; and with such a finding of fact there can be no interference in revision.

Patanjali Sastri, J.

Patanjali Sastri, J.—In this case I have the misfortune to be of a different opinion from my Lord whose judgment I have had the advantage of reading. As the facts of the case are all set out in that judgment I will content myself with

1. (1929) L.R. 57 I.A. 1: I.L.R. 5 Luck. 1 (P.C.).

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briefly stating the position as I conceive it in the light of the Privy Council decision in *National Bank of Upper India* v. *Bansidhar*[1], on the question of authority to pay for purposes of S. 20 of the Limitation Act.

It will be observed that the section does not require 'authority to keep the debt alive', an expression sometimes used in the discussion of this question. The authorisation must relate to the payment of interest on the debt or to the part payment of the principal as the case may be, and the debt is kept alive as the legal consequence of such payment, irrespective of the intention of the debtor or his agent. It is therefore not strictly relevant, and may, indeed, be somewhat misleading, to enquire whether the person paying was authorized to keep alive the debt. The question of limitation hardly enters into the minds of the parties at the time of the transaction from which Courts are subsequently called upon to imply authority in cases of the kind now before us. I refer to this because I cannot help thinking that the decision of the question has sometimes been allowed to be coloured by the supposed hardship to the debtor of implying authority to pay in such cases.

Where a debtor transfers his property in consideration either in whole or in part of the transferee undertaking to discharge the former's liability to a creditor, I agree that if the stipulation is that the transferee should pay off the debt all at once with no discretion left to him as to paying it in parts, as if he were a messenger sent with the amount required to make the payment, no authority to make a payment of either interest or part of the principal can be implied. But, if all that appears from the transaction is that the party paying has bound himself to the debtor to discharge the latter's liability, I find it difficult to see, with all respect, why the case is not governed by the Privy Council ruling in *National Bank of Upper India* v. *Bansidhar*[1]. In that case in setting out the true legal effect of the transaction, their Lordships observe at page 7 that:

"As between Bishambhar and the first respondent (the debtor) the former undertook to *discharge* the liability to the bank"

and, again at page 9:

'Upon what they have already held to be the true meaning and effect of the transaction of the 22nd of December, 1917, it was agreed between Bishambhar and the first respondent that the former would *discharge* the latter's

1. (1929) L.R. 57 I.A. 1: I.L.R. 5 Luck. 1 (P.C.).

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debt to the bank in respect of both principal and interest and it is clear from the first respondent's evidence that he left it to Bishambhar to do so." (Italics mine.)

No doubt, it would appear from the facts in that case that Bishambar was not in a position to pay off the debt immediately, for, that indeed occasioned the transaction there in question, and that therefore the parties must have contemplated payment at sometime in future. But is the position essentially different when a transferee of the debtor's property agrees, in consideration of the transfer, to discharge a debt of the transferor? The arrangement, as in that case, imposes on the transferee, as between himself and the debtor, an obligation to pay the principal of the debt as well as the interest due upon it as long as it remains unpaid. This obligation continues whether the debtor thought the debt subsisted or not, and the payment by the transferee under the contract reduces the liability of the debtor. In such circumstances, I can see no reason why the payment should not be regarded as having been made with the authority of the debtor who gets the benefit of it by virtue of the stipulation. And, viewed as a question of 'authority to keep alive the debt', there would seem to be as much ground in the case before the Privy Council as in this for saying that the contract or mandate to discharge the debt did not imply a 'power to keep alive the debt', for it is only reasonable to suppose that the debtor there also would naturally have refused to allow the debt to be kept alive beyond the period of limitation. The true principle would seem to be what Farwell, L.J., deduced from *Bradshaw* v. *Widdrington*[1] in *Lacey*, In re: *Howard* v. *Lightfoot*[2]. The learned Judge observed:

"I read it as a decision on the words 'or agent', and as shewing that a man can be an 'agent' within the meaning of the Act, not only when he acts for a principal properly so called *but also when he makes the payment on behalf of the debtor, because he has bound himself by deed for value so to do*". (Italics mine.)

That, I venture to think, is the principle which their Lordships of the Privy Council applied in *National Bank of Upper India* v. *Bansidhar*[3], where they also refer to Farwell L. J.'s view of the matter.

1. (1902) 2 Ch. 430.
2. (1907) 1 Ch. 330 at 350.
3. (1929) L.R. 57 I.A. 1: I.L.R. 5 Luck. 1 (P.C.).

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It seems to me, therefore, that the broad view expressed without any qualification in *Thinnappa Chettiar* v. *Krishna Rao*[1] that:—

"A power to extinguish the debt would not, in our opinion, carry with it a power to keep alive the debt. Our High Court has consistently taken the view that a direction or power to discharge a debt does not make the donee of the power an agent authorized to make a part payment so as to keep alive the debt."

referring to the earlier decisions of this Court to the same effect, cannot be accepted as correct in view of the Privy Council decision in *National Bank of Upper India* v. *Bansidhar*[2]. I may also observe, in this connection, that the decision in *Linsell* v. *Bonsor*[3] does not, as it seems to me with all respect, lend support for the above broad proposition as was supposed in *Alagappa Chettiar* v. *Subramania Pandia Thevar*[4], which has been followed in the later cases. There was a clear prohibition in the English case to make any part payment towards the debt.

Turning now to the facts of the present case, the mortgage deed has not been produced and all that appears about its terms from the judgment of the lower Court is that the mortgagee was directed thereunder to pay the amount due under the suit promissory note. Nearly two months after the mortgage, both the debtor and the mortgagee sent a notice (Exhibit B) to the petitioner informing him of the mortgage and suggesting a novation to which the petitioner, however, did not agree. These facts indicate to my mind that the mortgagee was not required or expected to discharge the debt all at once, but to pay it off as it suited him. The Privy Council ruling therefore applies and the finding of the Court below which, relying on the decisions of this Court, refused to imply authority in such circumstances cannot stand.

I would allow the Civil Revision Petition with costs throughout.

K. S. *Petition dismissed.*

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1. (1940) 2 M.L.J. 726.
2. (1929) L.R. 57 I.A. 1 : I.L.R. 5 Luck. 1 (P.C.).
3. (1835) 2 Bing. (N.C.) 241 : 132 E.R. 95. 4. (1914) 26 M.L.J. 509.

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Bombay.]

PRESENT:—VISCOUNT MAUGHAM, LORD RUSSELL OF KILLOWEN, LORD WRIGHT, SIR GEORGE RANKIN AND MR. M. R. JAYAKAR.

The General Accident Fire and Life
Assurance Corporation, Ltd. .. *Appellants**

v.

Janmahomed Abdul Rahim .. *Respondent.*

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Limitation — Administration bond — Default by administrator —Bond assigned to heir on attainment of majority—Action against administrator—Whether 'on a bond'—Period of limitation applicable—Indian Limitation Act (IX of 1908), Art. 68—Indian Succession Act (XXXIX of 1925), S. 292.

An assignment of an administration bond under S. 292 of the Indian Succession Act, 1925, does not have the effect of conferring a new cause of action on the assignee. Accordingly, where an administrator has executed an administration bond subject to a condition and that bond is assigned to the heir under S. 292, an action brought by the heir against the administrator for a default in administration is an action on a bond within the meaning of Art. 68 of the Limitation Act, 1908, and must be brought within three years of the breach of the condition in the bond.

The time when such a condition is broken within the meaning of Art. 68 is the time at which the administrator commits his act of default and not the date at which a person, such as the heir, able to give a valid discharge for the estate, claims it and fails to obtain it. The office of administrator comes to an end with the administrator's death, and accordingly he cannot be held to have been guilty of any breach of the condition in the bond after that event.

Manubhai Chunilal v. *General Accident Fire and Life Assurance Corporation, Ltd.*, (1936) I.L.R. 60 Bom. 1027, overruled.

Maung San U v. *Maung Kyaw Mye*, (1923) I.L.R. 1 Rang. 463, approved.

Consolidated appeals from a decision of the High Court, Bombay, in the appellate jurisdiction (*Beaumont, C. J. and Kania, J.*) dated 31st March, 1938, confirming a decision of that Court in its Ordinary Original Civil Jurisdiction (Engineer, J.) dated 24th May, 1937.

One Abdul Rahim died intestate in September, 1924, and his widow became administratrix of the estate for the period of minority of any of his three sons (all minors) who were entitled to the estate subject to the widow's rights of maintenance. The widow, and the General Accident Fire and Life Assurance Corporation as sureties in due course signed an administration bond for Rs. 3,98,060 in favour of the Registrar of the High Court

* P. C. Appeal No. 43 of 1939. 17th September, 1940.

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in its intestate jurisdiction, the bond being subject to various conditions imposed on the widow and relating to the proper administration of the estate. In July, 1925, the widow appointed to act for her in all matters relating to the administration, an attorney called Bhatra who misapplied the property. The widow died in 1929, and in 1931 the eldest son attained majority. In March, 1932, the Court made an order for the assignment of the administration bond to him in accordance with the terms of S. 292 of the Indian Succession Act, 1925, and in November, 1932, the eldest son instituted these proceedings claiming from the defendant insurance company as sureties the amount of the loss to the estate resulting from the widow, acting as administratrix. Those proceedings were instituted in time if Art. 120 of the Limitation Act of 1908 should be applicable. The defendants, however, contended that Art. 68 was applicable, and that the action was barred. The Courts in India overruled that objection, and the defendant company now appealed to His Majesty in Council.

Sir T. J. Strangman, K.C. and *W. W. K. Page* for Appellants.—We contend first of all that this action is clearly one on a bond, to which Art. 68 is applicable. Here, the latest date, it is submitted, at which the cause of action could arise was the death of the administratrix in April, 1929. Therefore the suit, instituted as it was in November, 1936, must be barred. (Counsel referred to the definition of "bond" in S. 3 of the Limitation Act, and to cls. 45 and 46 of the Letters Patent, dated 8th December, 1823, founding the Supreme Court of Bombay).

We submit that when the benefit of the bond is assigned to the heir no new cause of action accrues to him; the starting point of time remains the date of the breach by the administratrix. The grounds for the decisions in *Manubhai Chunilal's case*[1] are open to challenge. (Counsel referred to Blackwell J.'s judgment in that case and to *Maung San U* v. *Maung Kyaw Mye*[2], *Kanti Chandra Mukerji* v. *Ali-i-Nabi*[3] and In the goods of *Young*[4], as showing that such cases had been decided each way.

Pratt, K.C. and *Khambatta* for Respondent.—Art. 68 is, we submit, not applicable. The action is a peculiar one to which no article of the Act is specially applicable. Therefore by Art. 120 the plaintiff had six years in which to bring his action from the date when his right to sue accrued. The question is when his cause of action arose. This action is not on the bond at all and could equally well have been instituted against the personal repre-

1. (1936) I.L.R. 60 Bom. 1027.
2. (1923) I.L.R. 1 Rang. 463.
3. (1911) I.L.R. 33 All. 414.
4. (1866) 1 P.D. 186 at 189.

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sentatives of the administratrix to compel them to make good any loss to the estate for which she was liable. No cause of action can, it is submitted, arise until the loss is ascertained.

Supposing however, that Art. 68 applied in such a case the cause of action would not arise until the heir or some one similarly entitled to do so had claimed the estate and failed to obtain his due or some part of it. S. 292 of the Act of 1925 does not merely give a new starting point by implication; it is submitted that it is to be construed as an express statutory provision to that effect. An application is made to the Court, which thereupon confers on the applicant a statutory right of action. What else can the words "who shall thereupon be entitled to sue" mean? This is clearly, we submit, an enabling section, and such a section cannot be referable to a right which already existed before. It is not merely confirmatory, as the wording shows. It creates a new title to the estate.

Khambatta following.—If the assignee of such a bond was a minor, and his guardian failed to sue on it, the minor would surely not lose his interest. Clearly he would be entitled to sue when he attained majority, because a new cause of action would have arisen under S. 292 of the Act of 1925, and the right of action would have accrued on his attaining majority.

(Counsel referred to *Maharaja Jagadindra Nath Roy Bahadur* v. *Rani Hemanta Kumari Debi*[1].)

Strangman, K.C., replied.

17th September, 1940. Their Lordships' judgment was delivered by

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VISCOUNT MAUGHAM.—There are here two consolidated appeals from a judgment and decree of the High Court of Judicature at Bombay in its appellate jurisdiction dated the 31st March, 1938, confirming with a variation a judgment and decree of that Court in its ordinary original civil jurisdiction. The facts are very complex and the questions raised on the appeals are questions of considerable importance. The appellants, however, who were the defendants in the suit, besides disputing liability on a number of grounds have raised the contention that the suit was barred by Art. 68 of the Indian Limitation Act (IX of 1908). This question was based on substantial grounds and their Lordships thought it right to hear the arguments of both sides upon it before embarking on the

1. (1904) L.R. 31 I.A. 203 at 210: I.L.R. 32 Cal. 129 (P.C.).

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other questions raised on the appeal and the cross-appeal; and in the result they have come to the conclusion that the point of limitation raised by the appellants is well founded and accordingly it has not been necessary for them to go into the other matters above referred to.

In order to deal with the question of limitation it is necessary to state the following facts.

On the 18th September, 1924, Abdul Rahim died intestate at Bombay leaving him surviving a widow, Hawabai, three sons and three unmarried daughters. All his children were then minors. According to the law by which he was governed his three infant sons became entitled to his estate in equal shares subject to the right of his widow to maintenance pending remarriage or death, and to the rights of his daughters to maintenance until marriage or death, and to their marriage expenses.

On the 17th March, 1925, the widow of Abdul Rahim (Hawabai), having been duly empowered by the High Court, filed a petition in the High Court for the grant to her of letters of administration to the estate of her deceased husband for the use and benefit of his three minor sons and limited to the period of minority of any of them. It was stated in the schedule to the petition that the movable and immovable properties of Abdul Rahim were valued at Rs. 2,75,791 and for the purposes of probate duty the estate was valued at Rs. 1,99,025 after deducting funeral expenses and debts. On the 6th May, 1925, it was ordered that on the sureties being justified for the whole of the estate of Abdul Rahim and on filing the necessary administration bond, and on payment of fees and stamp duty, letters of administration should issue as prayed to Hawabai.

On the 14th May, 1925, Hawabai and the present appellants as sureties executed a bond for Rs. 3,98,060 in favour of the Registrar of the High Court in its testamentary and intestate jurisdiction and the head assistant to the Prothonotary and Registrar of the Court. The conditions of the bond were in the usual form. The obligation was to be void and of no effect if Hawabai

(1) should make or cause to be made a true and perfect inventory of the property and credits of the deceased which had or should come to her hand, possession or knowledge or to the hands or possession of any other person or persons for her and should exhibit or cause to be exhibited to the High Court such inventory on or before the 14th November, 1925;

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(2) should well and truly administer such property and credits according to law;

(3) should make or cause to be made a true and just account of her administration on or before the 14th May, 1926; and

(4) All the rest and residue of the property and credits which should be found remaining upon the said account after being first examined and allowed by the High Court should deliver and pay unto such person or persons as shall be lawfully entitled to such residue.

On the 9th June, 1925, the letters of administration were duly issued to Hawabai on behalf of the three minor sons of the intestate for their use and benefit until one of them should attain his majority.

It is alleged by the plaint that on the 2nd July, 1925, Hawabai, who was a purdanashin lady, and illiterate, appointed one Bhatra who was related to her, being the son of her maternal uncle, her attorney to act for her in all matters relating to the estate of Abdul Rahim. This person, however, misapplied the property and subsequently (on the 22nd October, 1928) committed suicide. Hawabai commenced various proceedings in an endeavour to recover the property forming part of the estate of Abdul Rahim, but on the 27th April, 1929, she died.

On the 14th November, 1931, the eldest son of Abdul Rahim, Janmahomed Abdul Rahim (who will be called "the plaintiff") attained his majority.

On the 24th March, 1932, an order was made by the High Court that the Court should assign the administration bond to the plaintiff, his heirs, executors or administrators, and it was further ordered that on such assignment the plaintiff, his heirs, executors or administrators should be entitled to sue on the bond in his or their name or names as if the same had been originally given to him or them, and should be entitled to recover thereon as trustee or trustees for all persons interested the full amount recoverable in respect of any breach thereon.

By a deed of assignment dated the 14th August, 1932, certain officers of the Court appointed for that purpose by an order of the Chief Justice purported to assign the bond to the plaintiff (the present respondent) "to hold the same unto the assignee absolutely with all such powers, rights and remedies as are now subsisting thereon." The assignment was effected under S. 292 of the Indian Succession Act of 1925 which is in

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these terms:—

The Court may, on application made by petition and on being satisfied that the engagement of any such bond has not been kept, and upon such terms as to security, or providing that the money received be paid into Court, or otherwise, as the Court may think fit, assign the same to some person, his executors or administrators, who shall thereupon be entitled to sue on the said bond in his or their own name or names as if the same had been originally given to him or them instead of to the Judge of the Court, and shall be entitled to recover thereon, as trustees for all persons interested, the full amount recoverable in respect of any breach thereof.

It should be added that under S. 291 every person to whom any grant of letters of administration, with an exception not material to the present purpose, is committed must give a bond to the District Judge with one or more surety or sureties engaging in the due collection and administration of the estate of the deceased. The bond is in the usual form. It is the usual practice in such a case to apply S. 292 and to cause the bond to be assigned to the intending plaintiff. It does not appear to be necessary to discuss the older practice under the Letters Patent of 1823 founding the Supreme Court of Bombay.

On the 2nd November, 1932, the plaintiff (respondent) filed the present suit claiming from the defendants, the present appellants, the sum of Rs, 3,98,060, or such lesser sum as represents the loss of the estate of Abdul Rahim due to the failure of Hawabai as administratrix of that estate to carry out her obligations under the administration bond. The plaint alleged four specific breaches of duty by the administratrix which can be shortly stated as follows:—

(1) The appointment of Bhatra as her attorney to manage the estate of the intestate;

(2) allowing the sum of Rs. 50,003 shown in the inventory and accounts filed by her on the 2nd June, 1927, as being in her hands on that date to remain in the hands of Bhatra;

(3) the failure to realise a certain share of the intestate in the estate of his deceased father and allowing such share to remain in the hands of Bhatra; and

(4) the failure to hand over to the Acoountant-General of Bombay the estate of Abdul Rahim, all his heirs being minors.

The learned Trial Judge and the Appellate Court (Sir John Beaumont, C.J. and Kania, J.) in the course of their judgments held that on the question of limitation they were bound by the decision of the Appellate Court of Bombay in the case of *Manubhai Chunilal* v. *General Accident Fire and Life*

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Assurance Corporation, Ltd.[1] That case related to a similar bond, similarly assigned, and the Appellate Court, Sir John Beaumont, C.J. and Rangnekar, J., overruling Blackwell, J., decided that the defence of limitation under Art. 68 of the Indian Limitation Act was not available. In that case as in the present the beneficiaries at the date of the grant of letters of administration were infants, and in other respects the facts are not distinguishable from those in the present case. The question, therefore, arises whether the decision in *Manubhai's case*[1] is or is not correct.

Art. 68 of the Limitation Act, 1908, is one of a series of 183 articles in a schedule which relate to the limitation of suits, appeals and applications. The articles are introduced by S. 3 in the following words:—

"Subject to the provisions contained in Ss. 4-25 (inclusive): Every suit instituted, appeal preferred, and application made after the period of limitation prescribed therefor by the first schedule shall be dismissed, although limitation has not been set up as a defence."

The provision contained in Art. 68 is to the following effect:—

"On a bond subject to a condition," the period of limitation is to be three years and the time from which the period begins to run is stated to be "when the condition is broken."

Art. 120 is stated to relate to any suit "for which no period of limitation is provided elsewhere in this schedule." The period of limitation is in that case six years and the time from which the period begins to run is "when the right to sue accrues." The word "bond" is defined in S. 2 (3). The word is stated to include "any instrument whereby a person obliges himself to pay money to another, on condition that the obligation shall be void if a specified act is performed, or is not performed, as the case may be." It is not in dispute that the bond in this case is a bond within the terms of that definition, and it is clear that Art. 120 has no application if Art. 68 applies to the present case. It may be added that S. 6 of the Act (which deals with suits by infants) clearly has no application.

Before considering the grounds on which the High Court in *Manubhai's case*[1] came to the conclusion above referred to it may be desirable to point out that a Limitation Act ought

1. (1936) I.L.R. 60 Bom. 1027.

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to receive such a construction as the language in its plain meaning imports. (*See* the decision of this Board in *Abhiram Goswami* v. *Shyama Charan Nandi*[1].) As was well stated by Mr. Mitra in his Tagore Law Lectures, 6th ed., (1932) Vol. I, p. 256: "A law of limitation and prescription may appear to operate harshly or unjustly in particular cases, but where such law has been adopted by the State . . . it must if unambiguous be applied with stringency. The rule must be enforced even at the risk of hardship to a particular party. The Judge cannot on equitable grounds enlarge the time allowed by the law, postpone its operation, or introduce exceptions not recognised by it." Very little reflection is necessary to show that great hardship may occasionally be caused by statutes of limitation in cases of poverty, distress and ignorance of rights; yet the statutory rules must be enforced according to their ordinary meaning in these and in other like cases. Their Lordships think it is possible that sympathy for the plaintiff in the case which must now be considered was allowed to affect a pure question of construction. In the present case, however, it may be observed that an administration bond is as often assigned when persons of full age are concerned as when the beneficiaries are all of them infants; and that such a bond is of the nature of an additional security taken by the Court for the benefit of the beneficiaries. If a right of action under the bond become statute barred by the operation of Art. 68 of the Limitation Act that does not affect the rights of the beneficiaries against the administrator. While making these observations their Lordships think it right to repeat that mere considerations of hardship in such a case should not be taken into account.

In *Manubhai's case*[2], Blackwell, J., took the view that the bond being within the definition in the Limitation Act and the action being on a bond subject to a condition, time began to run from the last date on which the condition was broken and no action could therefore be brought after the expiration of three years. In coming to this conclusion he followed the decision of the Appellate Court of Rangoon in *Maung San U* v. *Maung Kyaw Mye*[3]. Blackwell, J., in an admirable judgment dealt with the effect of an assignment of a bond under S. 292

1. (1909) 19 M.L.J. 530: L.R. 36 I.A. 148: I.L.R. 36 Cal. 1003 (P.C.).
2. (1936) I.L.R. 60 Bom. 1027.
3. (1923) I.L.R. 1 Rang. 463.

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of the Indian Succession Act and observed that in his opinion such an assignment merely deals with the question of title and confers upon the assignee a right to sue which he would otherwise not have had previously to the assignment, and that the section thus merely entitles the assignee to recover as a trustee for all persons interested the full amount recoverable under the bond in respect of any breach of it. On appeal it was not doubted that the bond was a bond upon a condition, but the Court held that a suit to enforce the bond by a person to whom it has been assigned under S. 292 was not a suit upon a bond within the meaning of the article because, it was said, the assignment confers substantive rights upon the assignee. Their Lordships, with all respect, are unable to follow this argument, nor can they agree that there is any difficulty as regards the consideration for the assignment. It is of course true that a suit by the assignee of such a bond is a suit by a person who derives title from the assignment which is authorised by the terms of S. 292 of the Indian Succession Act, 1925; but their Lordships are unable to see how this can be held to show that the action on the bond by the assignee is not a suit on a bond subject to a condition. Every valid assignment of a bond confers substantive rights upon the assignee, but those rights are not, in any case suggested to their Lordships, greater than the rights possessed by the assignor. It may be noted that the ordinary security bond which is given by receivers in India under the provisions of the Code of Civil Procedure O. 40, r. 3 is given to an officer of the Court (*see* App. F, Form No. 10); yet it has never been suggested that a suit upon such a bond, if brought by an assignee, is in any way different from an ordinary suit by the holder of a bond, the condition of which has been broken.

There were two other grounds for the conclusion of the Court. First it was held that, assuming that Art. 68 applied to the case, it was impossible to say that the condition was broken until some person who was able to give a valid discharge for the estate claimed it from the administrator or his representatives and failed to obtain it. The consequence of that view was said to be that the condition was not broken within the meaning of Art. 68 until the plaintiff attained his majority which was less than three years before the suit was filed. In other words the death of the administrator was held not to put

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an end to his liability as regards future events. Their Lordships cannot agree. An administrator of an intestate is merely the officer of the Court in whom the deceased himself has reposed no trust. On the death of the former the estate of the intestate does not pass to his heirs or representatives and no authority whatever can be transmitted by him, nor has anyone claiming under him any right to interfere with or to complete the administration of the property of the intestate. The office comes to an end on death (if not before) and the course which should be taken when an administrator dies is to obtain a grant of administration *de bonis non*, and the person to whom such grant is made will be entitled to take possession of the property. It therefore seems to their Lordships impossible to hold that the administratrix in the present case could possibly have been guilty of any default or misconduct in relation to the administration after the date of her death, though, of course, her representatives would continue liable in respect of any such default or misconduct committed by her during her lifetime. It seems equally impossible to suggest that the condition of the bond could be broken by the administratrix by the default of some person in relation to the estate of the intestate after the original letters of administration had ceased to have any operation by reason of the death of the administratrix. The condition of the bond according to its terms was therefore broken at the latest on her death, that is, more than three years prior to the suit.

The other and perhaps the main ground for the conclusion of the Court in *Manubhai's* case was that S. 292 of the Indian Succession Act had the effect of conferring a new cause of action on the assignee, and therefore provided a fresh starting point for the purposes of limitation. If the language of S. 292 of the Indian Succession Act be examined it is difficult to suppose that the draftsmen intended to provide for the creation of a new cause of action upon the assignment of a bond thereunder. The essential words are taken *verbatim* from S. 83 of the (English) Court of Probate Act, 1857 (20 and 21 Vict. C. 77) which provides that "the Court may . . . on being satisfied that the condition of any such bond has been broken, order one of the Registrars of the Court to assign the same to some person" . . . "and such person shall thereupon be entitled to sue on the said bond in his own name . . . as if the same had

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been originally given to him instead of to the Judge of the Court and shall be entitled to recover thereon as trustee for all persons interested the full amount recoverable in respect of any breach of the condition of the said bond." (The modern provision to the same effect is to be found in S. 167 of the Judicature Act, 1925.) It has never been suggested that under either of these sections there is upon the assignment being made a fresh cause of action. The origin of the ancient practice of requiring the administration bond to be given to the Judge of the Court of Probate (S. 81 of the Court of Probate Act, 1857) was no doubt to enable that Court to have control over all matters relating to the enforcement of such bonds. It is scarcely necessary to add that it had obviously nothing to do with the English period of limitation as regards the enforcement of such a bond which was twenty years from the breach of the condition. It seems to their Lordships that the words used in S. 292 of the Succession Act like those used in S. 83 of the Court of Probate Act, 1857, are far from assisting the contention that a new cause of action arises upon the assignment. The bond is assigned to a person who is thereupon to be entitled to sue on the bond in his own name "as if the same had been *originally* given to him, and he is to be entitled to recover thereon . . . the full amount *recoverable* in respect of any breach thereof." These sentences do not in the least support the view that a fresh cause of action arises and that therefore the condition of the bond is not broken for the purposes of the Limitation Act until the date of the assignment. The judgments of the Appellate Court of Rangoon in *Maung San U* v. *Maung Kyaw Mye*[1] and of Blackwell, J., in *Manubhai's* case are in the opinion of their Lordships correct and the decision of the Appellate Court in the latter case must be taken to be erroneous.

This view makes it unnecessary to consider any of the other questions raised on the appeal and cross-appeal. The defence of limitation under Art. 68 was a good one, and the suit should have been dismissed with costs.

Their Lordships will humbly advise His Majesty that the appeal should be allowed, that the cross-appeal should be dismissed, and that the respondent to the appeal should pay the costs here and below.

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1. (1923) I.L.R. 1 Rang. 463.

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Solicitors for Appellants: *Smiles & Co.*
Solicitors for Respondent: *T. L. Wilson & Co.*
R. C. C.

K. S. *Appeal allowed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Ordinary Original Civil Jurisdiction.]

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, MR. JUSTICE KING AND MR. JUSTICE PATANJALI SASTRI.

F.B.

Sudalaimani Nadar *v.* Commissioner of Income-tax, Madras.

S. V. P. Sudalaimani Nadar .. *Petitioner**

v.

The Commissioner of Income-tax, Madras .. *Respondent.*

Income-tax Act (XI of 1922), S. 3—Purchase in and export of livestock from British India and sale of the same in Colombo—Inflation of the prices in the invoices to Colombo—Profits—Computation for assessment.

The assessee exported goats and sheep from British India to Colombo where they were sold at a profit. The prices disclosed in the invoices when shipping to Colombo were relieved by the Income-tax authorities to be inflated and they sought to assess a presumed difference between the cost price and the invoice price as estimated profits accrued to the assessee in British India from his business for the year 1936-37. Also a value was sought to be placed on the 'supervision' exercised by the assessee over his agents in the purchases. On objection to assessment on this basis,

Held, (i) The profit made by the assessee could only be calculated on what the goats and sheep actually cost him and the amounts at which they were actually sold in Colombo. The figures in the invoices whether inflated or not, did not matter. (ii) In cases like this the profits arise only at the place of sale.

The Secretary, Board of Revenue (Income-tax), Madras v. *The Madras Export Company*, (1923) 44 M.L.J. 290: I.L.R. 46 Mad. 360: and *Jiwan Das* v. *The Commissioner of Income-tax, Lahore*, (1929) I.L.R. 10 Lah. 657 followed.

The Commissioner of Income-tax, Bombay v. *Chunilal B. Mehta*, (1938) L.R. 65 I.A. 332: I.L.R. (1938) Bom. 752 (P.C.), distinguished.

Reference under S. 66 (3) of the Indian Income-tax Act (XI of 1922) by the Commissioner of Income-tax, Madras, in pursuance of the High Court's order.

The facts appear sufficiently from their Lordships' Judgments.

K. Bashyam Ayyangar for Petitioner.

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*O. P. No. 203 of 1939. 24th September, 1940.

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K. V. Sesha Ayyangar for Respondent.

The Court delivered the following

JUDGMENTS: *The Chief Justice.*—The assessee in this case is the manager of a joint Hindu family which exports goats and sheep from this country to Colombo and sells them there at a profit. For the year 1936-37 the assessee was assessed to income-tax by the Income-tax Officer, Tuticorin Circle, on a total income of Rs. 16,412 which included a sum of Rs. 15,139 found to be the profits made in Colombo and remitted to British India. The Income-tax Officer's order of assessment was revised by the Commissioner of Income-tax, who assessed the income at Rs. 31,384. Included in this amount was the figure of Rs. 9,000 which the Commissioner said was the amount of profit which had accrued to the assessee in British India from this business. The Commissioner considered that the assessee had bought the animals at lower prices than those disclosed in his invoices when shipping them to Colombo. The assessee objected to an assessment on this basis and asked the Commissioner to state a case to this Court. The Commissioner refused, but was compelled to do so by an order of this Court, dated the 17th October, 1939. In pursuance of this Court's direction the Commissioner has referred the following question:

"Are the Income-tax authorities entitled in law to increase the petitioner's assessment by Rs. 9,000 as being profits made in British India for the year 1936-37"?

In his order revising the assessment the Commissioner gave the following reasons for holding that the assessee had made profits in British India: (i) the assessee had agents for the purchase of goats and sheep within the Presidency but he himself had exercised "a certain amount of supervision" and this had its value; and (ii) there was usually an element of profit involved in F. O. B. prices and in this case the profit had not been included in the profit shown by the Colombo books. These are the only two reasons which the Commissioner gave for holding that the assessee had made a profit of Rs. 9,000 in British India in the year of assessment. The reasons for the inclusion of this sum of Rs. 9,000 given by the Commissioner in making the reference are of a nebulous character and what it comes to is that the Commissioner considered that the assessee had made more profit than he had shown and he formed in his

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own mind an estimate of what that profit was. The Commissioner was not called upon in this case to exercise his best judgment within the meaning of S. 23 (4). To say that the goats and sheep shipped from this country to Colombo left it with an increased value because the assessee had supervised his agents is going too far. The second reason given by the Commissioner is also fallacious. Because exporters, when they sell at F.O.B. prices, include in those prices their profit does not mean that in a case like the present one profit is included. When this case is examined it is manifest that the prices at which the animals were invoiced to Colombo would make no difference in the calculation of the profits made by the assessee. There is no evidence for the year of assessment that the assessee charged his Colombo office greater amounts than the cost to put the animals on board the steamers, but assuming that the invoices had been inflated that would not make any difference. The profit made by the assessee could only be calculated on what the goats and sheep actually cost him and the amounts at which they were actually sold in Colombo. The figures in the invoices, whether inflated or deflated, would not matter. We can see no justification whatsoever for the Commissioner for increasing the assessment by this figure of Rs. 9,000, or by any figure as estimated profits made in British India.

When a business is of this simple nature—the business we have here is the buying in one place of animals for human consumption and the selling of them in another place—the profit arises only at the place of sale. This was the effect of the decision in *The Secretary, Board of Revenue (Income-tax), Madras* v. *The Madras Export Company*[1] and there is an express ruling by the Lahore High Court in *Jiwan Das* v. *The Commissioner of Income-tax, Lahore*,[2] that profits derived from the sale in a foreign country of goods purchased in British India are not assessable to income-tax when the profits have not been received or brought into British India. Mr. Sesha Ayyangar, on behalf of the Commissioner of Income-tax, has suggested that this can no longer be regarded as the true position in law by reason of the decision of the Privy Council in *The Commissioner of Income-tax, Bombay* v. *Chunilal B. Mehta*[3] but it is clear that this

1. (1922) 44 M.L.J. 290: I.L.R. 46 Mad. 360: 1 I.T.C. 194.
2. (1929) I.L.R. 10 Lah. 657: 4 I.T.C. 40 (F.B.)
3. (1938) L.R. 65 I.A. 332: I.L.R. (1938) Bom. 752 : I.T.R. 521 (P.C.)

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is not the effect of the judgment of the Judicial Committee. There the question was whether a person who was carrying on business in Bombay and dealing in cotton in Europe and America could be assessed to income-tax on his profits made abroad. There is a vast difference between that case and the case now before us and the cases which do apply are *The Secretary, Board of Revenue (Income-tax), Madras* v. *The Madras Export Company*[1] and *Jiwan Das* v. *The Commissioner of Income-tax, Lahore*[2]. For these reasons I would answer the question referred in the negative and award costs to the assessee in the sum of Rs. 250. The assessee is also entitled to the refund of his deposit.

It is necessary to draw attention to another matter connected with this reference. When the case came before this Court on the question whether the Commissioner should be compelled to state a case it appeared that the Income-tax authorities were contending that the assessee's assessment might be increased by the Rs. 9,000 on the ground that it represented profits remitted to British India as well as on the ground that the amount represented profits which had accrued in British India. The figure at which the assessee had been assessed included the profits remitted from Colombo, and the Court asked Mr. Sesha Ayyangar to make it clear whether his real contention was that the Rs. 9,000 should be included as profit made in British India. He said that this was his contention and as the Court was not prepared in the circumstances of this case to allow the alternative argument to be put forward it directed that the statement of the case should be confined to that question alone. Instead of obeying the direction of the Court, which he was bound to do, the Commissioner in the last paragraph of the reference has said that the main question to be decided is whether the amount was assessable to tax or not and the question whether it comes under the one basis or the other is really of no consequence so long as it comes under one of them. Consequently he asked the Court to consider the other ground. Although we agree with Mr. Sesha Ayyangar that the Commissioner meant no disrespect, his failure to follow the directions of this Court can only be described as improper.

King, J.

King, J.—I agree.

1. (1922) 44 M.L.J. 290: I.L.R. 46 Mad. 360: 1 I.T.C. 195.
2. (1929) I.L.R. 10 Lah. 657: 4 I.T.C. 40 (F.B.)

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Patanjali Sastri, J.

Patanjali Sastri, J.—I agree.

K.S. *Reference answered in the negative.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Ordinary Original Civil Jurisdiction.]

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice,* MR. JUSTICE KING AND MR. JUSTICE PATANJALI SASTRI.

Vaidyaratnam P. S. Varier, Kottakkal, South Malabar .. *Petitioner**

v.

The Commissioner of Income-tax, Madras .. *Respondent.*

F.B.

Varier v. Commissioner of Income-tax, Madras.

Income-tax Act (XI of 1922), S. 6 (iv) and (vi)—Maintenance of dramatic troupe by a manufacturer of Ayurvedic medicines—Deduction for loss in maintaining troupe—Permissibility.

Where an assessee who was carrying on an extensive business in the manufacture and sale of Ayurvedic medicines, maintained a dramatic troupe on a commercial basis and not as a hobby and claimed a deduction of losses incurred in maintaining such troupe from the profits of his business for purposes of income-tax,

Held, though the maintenance of the dramatic troupe may not be a "business" it must be classified as a source, or possible source of income within the meaning of S. 6 (*vi*) of the Income-tax Act. The assessee is consequently entitled to deduct any loss incurred in maintaining the dramatic troupe from his other assessable profits.

Reference under S. 66 (3) of the Indian Income-tax Act (XI of 1922) by the Commissioner of Income-tax, Madras, in pursuance of the order of the High Court.

The facts appear sufficiently from their Lordships' judgment.

D. A. Krishna Variyar and *Ravi Varma* for Petitioner.

K. V. Sesha Aiyangar for Respondent.

The judgment of the Court was delivered by

Leach, C.J.

The Chief Justice.—The assessee is an Ayurvedic physician. He carries on an extensive business in the manufacture and sale of Ayurvedic medicines at Kottakkal, Palghat, and Calicut. In addition to the income which he derives from the manufacture and sale of medicines and from the practice of his

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* O. P. No. 267 of 1939. 24th September, 1940.

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profession, he derives income from property and "sundry other sources". One of his other activities is the maintaining of a dramatic troupe which gives public performances in the Malabar District, Cochin and Travancore at certain seasons of the year. At Kottakkal, Palghat and Calicut the assessee is the owner of premises in which he sells his medicines. At each place, adjoining the premises used by him for the sale of his Ayurvedic medicines, is a hall in which the assessee's dramatic troupe also gives performances. At all the performances prices for admission are charged. For the year 1937-1938 the assessee returned an income of Rs. 18,061-4-11 and sought to deduct a sum of Rs. 3,475 as loss incurred by him in that year in the maintenance of the dramatic troupe. The Income-tax Officer refused to allow the deduction. The ground for refusal was that the maintenance of this dramatic troupe really amounted to a hobby of the assessee and therefore could not be classified as a business. This order of the Income-tax Officer was confirmed by the Commissioner on appeal. The assessee then asked the Commissioner to state a case on the ground that the refusal to allow the deduction involved a question of law. The Commissioner rejected the application, and in consequence the assessee applied to this Court for an order compelling the Commissioner to make a reference. This Court agreed with the assessee that a point of law was involved and accordingly directed the Commissioner to make a reference on the following question:

Is there material to support the finding that the assessee's dramatic troupe is maintained by him as a hobby and not as a business or as a source of income?

The Commissioner has now made the reference.

The assessee has maintained this dramatic troupe for many years, and in the statement of the case made by the Commissioner the profits and losses for the years from 1922-23 to 1933-34 are set out. In 1922-23 there was a profit of Rs. 997 and in 1928-29 a profit of Rs. 1,820. It is common ground that when these profits were made the Income-tax authorities assessed them to income-tax. In the other years mentioned there were losses and upto and including the year 1934-35 the Income-tax authorities allowed deductions for the losses when assessing the assessee to income-tax. It is difficult to see how they could do otherwise seeing that they had insisted

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on taxing the assessee when he had made profits. The Income-tax Officer, Palghat, who made the assessment for the year 1935-36, however, decided that the assessee should not be allowed to deduct the loss of Rs. 3,475, which admittedly he had suffered in that year in this connection. The only ground that the Income-tax Officer advanced for disallowing this loss was that the dramatic troupe was a hobby and therefore could not become "a source" of income. That was his opinion, and as already indicated it was concurred in by the Commissioner.

The Commissioner has given two reasons in support of his decision. He says that the motive behind the formation of the dramatic troupe was philanthropic and not commercial because in a prospectus issued by the assessee it was said that the object of the founding of the troupe was to stage Malayalam dramas on reformed lines and to utilise the proceeds arising out of such performances for rendering free medical aid at the assessee's Vaidyasala. The second reason was that the assessee would never have persevered with such a losing concern unless he looked upon it as a hobby unconnected with his business activities. In opposing the finding that he was merely indulging in a hobby the assessee stated he seldom attended the performances and therefore the maintenance of the troupe could not be regarded as a hobby. The Commissioner has taken some pains to show that this statement is not true, but it is difficult to see what bearing this statement has on the question, whether true or false.

It is manifest that the assessee maintains this troupe on a commercial basis; whether he does so for the purpose of advertising his Ayurvedic medicines matters not. If this troupe earns a profit, as it has done in two of the years mentioned in the statement of the case, the profit would obviously be income from "other sources" within the meaning of S. 6 (*vi*), even if it could not be classified as income from a business under S. 6 (*iv*). In 1929-30 the profit made was taxed under "other sources". We are not prepared to accept the reasons advanced by the Commissioner in support of the theory that there is here a hobby and not a possible source of income. In fact we have no hesitation in holding that there was no material on the record to support the finding that the assessee's dramatic troupe is maintained by him as a hobby. It may not be a "business", but it certainly must be classified as a source, or possible source, of income.

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The question referred will be answered in the negative and as the assessee has succeeded, he is entitled to his costs, which we fix at Rs. 250. He is also entitled to the refund of his deposit of Rs. 100.

K. S. *Reference answered in the negative.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE BURN.

Gopala Menon .. *Petitioner* (2nd Respondent)*

v.

Punnoli Korath Meenakshi Amma Karnavastri and others .. *Respondents (Petitioners and Respondents 1, 3 to 7 and nil).*

Gopala Menon v. Meenakshi Amma.

Madras Agriculturists' Relief Act (IV of 1938), S. 23—Decree wiped out by sale in execution and satisfaction entered—Person who was judgment-debtor if entitled to apply under S. 23—Respondent if can raise question between him and a co-respondent by memo of objections—Practice.

Where before the commencement of Act IV of 1938 properties of the judgment-debtor had been sold away, the sale confirmed and satisfaction of the decree entered up there was no longer a 'judgment-debtor' because the decree itself had been wiped out before the commencement of Act IV of 1938 and after that no application under S. 23 was competent by a person who had previously been a judgment-debtor.

It is open to a respondent to raise in a memorandum of objections a question that arises only between him and a co-respondent.

Petition under S. 115 of Act V of 1908 praying that the High Court will be pleased to revise the order of the Court of the District Munsif of Parappanangadi, dated 1st October, 1938 and made in E. A. No. 587 of 1938 (S. C. No. 204 of 1935, Sub-Court, Calicut).

K. Kuttikrishna Menon for Petitioner.

K. P. Krishna Menon, A. P. Kuttisankara Menon and *C. K. Viswanatha Aiyar* for Respondents.

The Court delivered the following

JUDGMENT.—This is a revision petition against the order passed by the learned District Munsif of Parappanangadi in E. A. No. 587 of 1938 in S. C. No. 204 of 1935 on the file of the Sub-Court, Calicut. The application (E. A. No. 587 of 1938) was made by the second and third defendants in the Small Cause Suit. It was a petition under S. 23 of Madras Act IV of 1938. It contained an allegation that three items of immovable pro-

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*C. R. P. No. 461 of 1939. 3rd September, 1940.

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perty had been sold on the 28th October, 1937, in execution of the Small Cause Court's decree. It contained an allegation that the petitioners are agriculturists and persons eligible to be admitted to the benefits of the Agriculturists' Debt Relief Act and an allegation that the petitioners propose to file a petition in the Sub-Court, Calicut, to scale down the debt under the Agriculturists' Debt Relief Act. The prayer in the petition therefore was that the sale of the three items of immovable property held on the 28th October, 1937, be set aside under S. 23 of Madras Act IV of 1938. The first respondent to this petition was the decree-holder in the Small Cause Suit who had himself purchased item 2. The second respondent in the petition was the purchaser of item 1. He was a third party. Item 3 appears to have been purchased by some other party. The learned District Munsif allowed the application in so far as items 1 and 2 are concerned and directed that the sale be set aside. The third party purchaser of item 1 has preferred this revision petition from that order and the decree-holder purchaser of item 2 has filed a memorandum of objections in which he supports the petitioner and questions the validity of the order of the lower Court on the same grounds as those put forward by the petitioner.

The point taken by Mr. Kuttikrishna Menon on behalf of the petitioner is a point of law based upon the wording of S. 23 of Madras Act IV of 1938. S. 23 runs as follows:

"Where in execution of any decree any immovable property, in which an agriculturist had an interest, has been sold or foreclosed on or after the 1st October, 1937, then, notwithstanding anything contained in the Indian Limitation Act, 1908, or in the Code of Civil Procedure, 1908, and notwithstanding that the sale has been confirmed, any judgment-debtor, claiming to be an agriculturist entitled to the benefits of this Act, may apply to the Court within 90 days of the commencement of this Act to set aside the sale or foreclosure of the property, and the Court shall, if satisfied that the applicant is an agriculturist entitled to the benefits of this Act, order the sale or foreclosure to be set aside, and thereupon the sale shall be deemed not to have taken place at all:

Provided that no such order shall be made without notice to the decree-holder, the auction-purchaser, and other persons interested in such sale or foreclosure and without affording them an opportunity to be heard in the matter."

Mr. Kuttikrishna Menon points out that the application which may be made under this section must be made by a 'judgment-debtor' claiming to be an agriculturist entitled to the benefits of the Act. His contention is that on the 6th April, 1938, when the application to the lower Court was made the

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applicants were not judgment-debtors. Both the items of property with which this petition is concerned had been sold as already mentioned on the 28th October, 1937; the sale was confirmed on the 30th November, 1937 and on the same date satisfaction of the decree was entered up. That being so Mr. Kuttikrishna Menon contends that on the 6th April, 1938, nearly five months afterwards, there was no judgment-debtor in Small Cause No. 204 of 1935 because the decree itself had been wiped out. This contention appears to me to be sound and learned counsel who has appeared for the respondents judgment-debtors has not been able to adduce any arguments to meet it. It is, I think, clear that the person who makes the application under S. 23 of Madras Act IV of 1938 must be a judgment-debtor at the time he makes the application. The Act does not say that any person who was a judgment-debtor may apply. It simply says:

"Any judgment-debtor ...... may apply".

This petition must therefore be allowed and the order of the lower Court must be set aside in so far as item 1 is concerned. For the same reason I must allow the memorandum of objections preferred by the decree-holder purchaser. It is at first sight rather startling to find that in a memorandum of objections a respondent may raise a question that arises only between him and a co-respondent. But there is the authority of a Full Bench of this High Court for such a method of proceeding (vide *Munisamy Mudaly* v. *Abbu Reddy*[1]). The order of the lower Court as regards items 1 and 2 is therefore set aside and the application of the judgment-debtors dismissed. The petitioner will recover his costs from the judgment-debtors in both the Courts.

K.S. —— *Order varied,*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE KRISHNASWAMI AYYANGAR.

Ramalingam Chettiar v. Debt Conciliation Board, Dharmapuri.

P. V. Ramalingam Chettiar .. *Petitioner**
(Creditor)

v.

The Debt Conciliation Board, Dharmapuri, and another .. *Respondents.*

Madras Debt Conciliation Act (XI of 1936), Ss. 10 (1) and 23—Creditor duly filing his statement of claim—Failure of creditor to produce accounts—

1. (1912) 27 M.L.J. 740: I.L.R. 38 Mad. 705 (F.B.).

* C. M. P. No. 4631 of 1940. 13th November, 1940.

Ramalingam Chettiar *v.* Debt Conciliation Board, Dharmapuri.

Absence of creditor at hearing—Board declaring debt discharged—Legality of order—Review under S. 23—Availability of remedy—Effect on right to issue of writ of certiorari.

After a statement of claim has been filed by a creditor before the Board under S. 10 (1) of the Debt Conciliation Act, the Board has no longer jurisdiction to declare the debt as discharged under S. 10 (2). Where after filing such a statement the Board declares the debt discharged on the ground of the creditor's absence at the adjourned hearing and failure to produce account books, the order is unlawful and must be quashed by a *writ of certiorari*. The provision for review under S. 23 of the Act would not be such suitable or other remedy as to disentitle the creditor to the issue of *a writ*.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a *writ of certiorari* calling for the records in D. C. No. 1427 of 1939 on the file of the Debt Conciliation Board of Dharmapuri and to quash the proceedings and order dated 4th February, 1940, therein.

D. Ramaswami Ayyangar for Petitioner.

T. G. Raghavachari and *P. Srinivasa Ayyangar* for Respondent.

The order of the Court was made by

Leach, C.J.

The Chief Justice.—This is an application for the quashing of an order passed by the Debt Conciliation Board of Dharmapuri on the 4th February, 1940. It is abundantly clear that the order of the Board was one which was passed without jurisdiction, but the main question is whether the petitioner has by his conduct forfeited his claim to have the rule *nisi* which has been issued made absolute.

On the 19th July, 1939, the second respondent applied to the Board for the settlement of his debts under the provisions of S. 4 of the Madras Debt Conciliation Act, 1936. His application shows that the petitioner was his only creditor and according to the second respondent he owed him two sums of Rs. 200 each under bonds which he had executed. Notice was issued to the petitioner under S. 10 (1) and the 4th October, 1939, was fixed by the Board for the furnishing of the statement required from him by S. 10 (1). On that date the petitioner appeared before the Board and filed the necessary statement. In addition, he produced the two bonds executed by the second respondent in his favour and a copy of each of the bonds. In the statement which the petitioner filed it was mentioned that the second respondent was also indebted to him in the sum of Rs. 120, for rent. The Chairman of the Board initialled the original bonds

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and returned them to the petitioner, after which the Board adjourned the case to the 27th October, 1939, for the production by the petitioner of his accounts. On that date the petitioner reported to the Board that his accounts had been filed in the District Court and in consequence the Board adjourned the case to the 11th December, 1939, to enable the petitioner to obtain them from the Court. The petitioner was, however, informed that if he did not produce the accounts on that date an order would be passed discharging his debt. The petitioner did not attend on the 11th December and the Board adjourned the case to the 4th February, 1940. He had not filed the accounts by the 4th February, 1940 and when the case was called on that date he was absent. Therefore the Board passed an order declaring that the debt was deemed to be discharged under S. 10 (2) of the Act.

As I have indicated, this order was one which the Board had no authority to pass. S. 10 (1) requires a creditor to file a statement of the debts owed to him by the debtor. This statement must be in writing, signed and verified in the manner prescribed by the Code of Civil Procedure for the signing and verifying of claims. If such a statement is not filed, the Board has power under sub-S. (2) to order that the debt shall be deemed for all purposes and all occasions to have been duly discharged, but sub-S. (3) gives a creditor the right of applying for an order reviving the debt, and he is entitled to an order if he proves to the satisfaction of the Board that the notice was not served upon him or that he had no knowledge of the publication or that there was a sufficient reason for his failure to file the statement. The petitioner in this case did file the statement required by sub-S. (1) and it was signed and verified in the required manner. Therefore the Board could not act under S. 10 (2) which it purported to do.

S. 11 (1) requires a creditor to furnish with the statement mentioned in S. 10 (1) full particulars of all debts owed to him by the applicant and to produce all documents, including entries in books of account on which the creditor relies to support his claim, together with a true copy of every such document. If a creditor does not produce the documents required to be produced by him under sub-S. (1), the documents cannot by virtue of sub-S. (3) be produced in evidence against the debtor in any suit brought by the creditor or by any person claiming under

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him for the recovery of the debt. The Board is given power to excuse for valid reasons any default or delay in producing documents and to grant reasonable time for their production, but failure to comply with S. 11 (1) does not empower the Board to declare the debt discharged. The only penalty is that stated in sub-S. (3). If a creditor fails to prove the debt claimed to be owing to him the Board may decide the matter under S. 12. In the present case there is no question of the petitioner having failed to prove the debts owing to him, at any rate, so far as the debts due on the two bonds are concerned, because the second respondent admitted in his petition that they were due and owing to the petitioner. The Board's order of the 4th February, being an unlawful order, we should not have hesitated to grant the present application if the matter rested there; but it does not rest there and it is necessary to examine in detail the subsequent events.

On the 17th February, 1940, the petitioner applied to the Board to review its order of the 4th of that month. This application must be deemed to have been made under the provisions of S. 23 of the Act and not under S. 10 (3), because the latter section obviously does not apply. S. 23 says that a Board may on application from any interested person or on its own motion review an order passed by it and pass such order in reference to the application as it thinks fit, but no order is to be varied or reversed unless notice has first been given to all interested persons to appear and be heard in support of the order sought to be reviewed. On receipt of this petition the Board fixed the 26th March, 1940, for its hearing. Notice of the petition was sent to the second respondent by registered post, but the postal authorities were unable to find that respondent. On the date fixed for hearing the petitioner appeared, but as the second respondent had not been served, the Board ordered that fresh notice should be issued to him. The petitioner was required to provide the requisite stamp for service of notice by registered post. The hearing was then adjourned to the 23rd April, 1940. The petitioner paid the postage and the notice was apparently sent by registered post, because on the 23rd April, 1940, the Chairman of the Board made a note in the record which indicates that the debtor was served, but that the postal acknowledgment had not then been received. In these circumstances he granted another adjournment; on this occasion to the 5th May,

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1940. On that date the Chairman of the Board recorded the following order:

"Both parties absent. Creditor has not produced postal cover to send notice to the debtor. This petition for revival of the debt is therefore dismissed".

It would appear that the word "cover" is a mistake for "acknowledgment."

The petitioner was in fault when he failed to attend on the date when the last-mentioned order was passed, because to his knowledge the proceedings had been adjourned to that date. The question then is whether the Board should have refused the relief asked for because of the petitioner's failure to prosecute his application for review with due diligence. The explanation, for the petitioner's absence on the 5th May, 1940, is that the postal acknowledgment had not been received on that date. Be that as it may, the fact remains that the petitioner should have appeared and his failure to do so has certainly prejudiced his position. But after careful consideration, we have come to the conclusion that his fault here is not sufficient to deprive him of all remedy for the injustice done to him by the Board in declaring his debts discharged under S. 10 (2) of the Act.

While the Court will not issue a *writ of certiorari* when another remedy remains open to the petitioner, it must be a suitable remedy. As was pointed out by the Privy Council in *Besant* v. *Advocate-General of Madras*[1], *certiorari* according to the English rule is only to be granted where no other suitable remedy exists. Now, can it be said that by giving a person aggrieved by an order of a Debt Conciliation Board the right to apply for a review under S. 23, there is a suitable remedy for an unlawful order? We have no hesitation in holding that S. 23 does not provide a suitable remedy. It merely gives the right of applying to the tribunal which has passed a wrong order to change its mind. If S. 23 were regarded as providing a suitable remedy, it would mean that the Court could not issue a *writ* until the aggrieved person had filed a formal application for review. We consider that where a Debt Conciliation Board has acted in abuse of its powers the aggrieved person should not be compelled to apply for review. Moreover, there is the further factor that it is not obligatory on the person to apply for review if he is aggrieved. The petitioner here did apply for

1. (1919) 37 M.L.J. 139: I L.R. 43 Mad. 146: L. R. 46 I.A. 176 (P.C.).

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review, but did not do what the Board required him to do in connection with his application, namely to appear on the 5th May, 1940. As we have already indicated that is not sufficient in our opinion to deprive him of all remedy. If the Court does not interfere here, it means that the petitioner loses money which the second respondent admittedly owes him and he loses it because he failed to appear on one occasion in proceedings which were not really necessary. If the Court deprives him of all remedy in these circumstances, we think it would be doing the petitioner grave injustice. For these reasons we quash the orders of the 4th February and 5th May, 1940 and direct the Board to restore the petition and proceed with the case according to law.

As this application has been strenuously opposed by the second respondent, the petitioner is entitled to his costs.

K.S. —— *Orders quashed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KING AND MR. JUSTICE VENKATARAMANA RAO.

Kuthiravattath Kongasseri Puthukulangare Ukkali *alias* Pappi *alias* Amma Neithiar Avl. and another .. *Appellants** (*Plaintiff and Nil*)

v.

Pallassena Kizhakke Gramom, S. Sivaramakrishna Pattar .. *Respondent* (*Defendant*).

Ukkali *v.* Sivaramakrishna Pattar.

Malabar Tenancy Act (XIV of 1930), S. 17—Renewal of kanom—If to be on same terms.

The word 'same' in S. 17 of the Malabar Tenancy Act connotes a renewal of the kanom on the same terms as the previous kanom. If the landlord declines to grant a renewal on payment of the proper renewal fee the tenant can seek the aid of the Court and the Court should grant a renewal of the kanom only on the same terms as the previous kanom.

Second Appeal against the decree of the District Court of South Malabar in A. S. No. 359 of 1933 preferred against the decree of the Court of the District Munsif of Alatur in O. S. No. 395 of 1932.

C. Unnikanda Menon for Appellants.

R. Srinivasa Aiyar for Respondent.

*S. A. No. 205 of 1936. 11th October, 1940.

Ukkali v. Sivaramakrishna Pattar.

Venkataramana Rao, J.

The judgment of the Court was delivered by

Venkataramana Rao, J.—This second appeal arises out of a suit to recover arrears of michavaram under a kychit Ex. A dated 17th August, 1931, executed by the defendant in favour of the plaintiff. What was sought to be recovered was 30 paras of paddy and one anna three pies payable for the year 1931-32. Ex. A purports to be a renewal of a prior kanom under which the michavaram payable was 10 paras 1 edangali of paddy and one anna three pies. The defendant pleaded that the provision for the payment of increased michavaram was inserted in Ex. A without his knowledge and by the fraud of plaintiff's kariasthans, that he had agreed to take a renewal only on the same terms as those contained in the previous kanom Ex. I, that the stipulation in Ex. A for payment of increased michavaram was unsupported by consideration and was also opposed to the provisions of the Malabar Tenancy Act and that therefore it was not enforceable. Both the lower Courts have concurrently found that Ex. A was executed by the defendant with full knowledge of its contents and that no fraud was practised on him as alleged. This finding has not been challenged in second appeal. Both the lower Courts have however non-suited the plaintiff on the ground that the provision for payment of increased michavaram was contrary to the provisions of Ss. 17 and 32 of the Malabar Tenancy Act. The view taken by the learned District Munsif was that since the plaintiff's case was that the increased michavaram was the consideration for granting the renewal, it was invalid under S. 32 of the Act. This was based upon a statement made by P. W. 2 in the witness box that the proper renewal fee would be about Rs. 200 and that in cases where the tenants were not prepared to pay the renewal fees according to the Act, michavaram was increased. But the learned District Munsif observed that it was not possible to find out how far the amount paid at the time of the execution of Ex. A was more or less than the renewal fee payable if calculated in accordance with the Act because there was no satisfactory evidence to prove what such amount would be. The learned District Judge on appeal did not give any specific finding except merely stating that he agreed with the reasons given by the learned District Munsif in paragraph 6 of his judgment. He was clearly of the opinion that the increased michavaram was contrary to the provisions

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of S. 32 of the Act, at the same time observing that the said conclusion might be reached on a reasonable interpretation of Ss. 17 and 25 of the Act. It seems to us that it is not satisfactory to dispose of the matter in the way in which both the lower Courts have done without finding what the proper renewal fee payable under S. 17 of the Act would have been at the time of the execution of Ex. A, and that a finding on this question is necessary. Before disposing of this appeal we therefore think it desirable to call for a finding on the said question. We accordingly direct the learned District Judge to submit a finding on the said question within six weeks from the date of the receipt of this order after taking such evidence as may be adduced by the parties. Time for objection, ten days.

In compliance with the above order, the District Judge, South Malabar, submitted the following finding:

* * * *

We called for a finding from the District Judge on the following point "what would have been the proper renewal fee payable under S. 17 of the Malabar Tenancy Act at the time of the execution of Ex. A (17-8-1931)"? and the finding is that the proper fee would have been Rs. 71-13-9. Mr. Unnikanda Menon sought to challenge this finding of fact with which we cannot interfere in second appeal.

The defendant has paid Rs. 90 a few rupees more than the renewal fee which was payable under S. 17 (*a*) of the Malabar Tenancy Act. That section provides that on the expiration of the prior kanom under which the kanomdar was holding he is entitled to claim a renewal of the kanom on payment of the renewal fee specified therein and once a claim was made the plaintiff had no option but to grant a renewal of the kanom. The contention of Mr. Unnikanda Menon is that the landlord was bound to grant a renewal but not on the same terms. We are inclined to think that the word 'same' in S. 17 connotes a renewal of the kanom on the same terms as the previous kanom. This view derives support from S. 25 (2) of the Act. If the landlord declines to grant a renewal of the kanom on payment of the proper renewal fee, the tenant can seek the aid of the Court. The Court can then determine what the proper renewal fee payable under S. 17 (*a*) is and on deposit of such renewal fee the Court would execute the renewal deed. S. 25 (2) says hat the Court shall execute a renewal deed containing such

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terms as it determines to be the terms of the expiring transaction as are in accordance with law. The section is very specific in that it provides that the Court should grant a renewal of the kanom only on the same terms as the previous kanom. Mr. Unnikanda Menon sought to rely on S. 27 of the Act which according to his own admission does not apply to the facts of this case. If S. 27 does not apply, there is no other section on which he could rely and he has not relied on any other section. It seems to us that the view taken by both the lower Courts that under the kanom deed which the plaintiff sought to enforce he will not be entitled to claim the michavaram stipulated in the deed but only 10 paras and 1 edangali of paddy and Rs. 0-1-3 is in accordance with the terms of the previous kanom. We therefore confirm the decrees of both the lower Courts and dismiss the second appeal with costs.

K. S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KING.

Kesavan Chettiar .. *Appellant** (*6th Respondent*)

v.

Pakshi Ramaswami Chettiar and others .. *Respondents* (*Petitioners 2 and 3 and Respondents 2 to 5*).

Kesavan Chettiar v. Ramaswami Chettiar.

Limitation Act (IX of 1908), S. 20 (2)—Usufructuary mortgage—Final decree upon mortgage—Execution application 4½ years after final decree—Income enjoyed by decree-holder whether would be deemed payment—Limitation whether saved thereby for purposes of execution.

The receipt of rent by a mortgagee in possession is not payment by the mortgagor in the ordinary sense of the word. S. 20 of the Limitation Act however says that it shall be deemed to be payment, because the mortgagor has himself consented to it in his contract with the mortgagee. It is thus an acknowledgment, continually repeated so long as the contract is in force, by the mortgagor of the mortgagee's claim under the mortgage. But a final decree in a suit on such mortgage puts an end to the contract and in regard to payment substitues new terms to regulate the rights of parties. It is no longer open to the mortgagee, who has become the decree-holder, to appropriate the income of the mortgaged property towards his interest. That interest is limited to 6 per cent. and he must recover it by sale of the mortgaged property. If he remains in possession and appropriates to himself the income of the mortgaged properties that is no longer an action to which the mortgagor, who is now the judgment-debtor, has consented—and is therefore in no sense any

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* A.A.A. O. No. 118 of 1939. 26th August, 1940.

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acknowledgment by him. S. 20 of the Limitation Act cannot successfully be called in aid to save the bar of limitation, for purposes of execution of the decree.

Sundar Koer v. *Rai Sham Krishen*, (1906) 17 M.L.J. 43: L.R. 34 I.A. 9 I.L.R. 34 Cal. 150 at 161: (P.C.); *Ellarayyan* v. *Nagaswami Ayyar*, (1926) 50 M.L.J. 612: I.L.R. 49 Mad. 691, relied on.

Vaidhinadasamy Ayyar v. *Somasundram Pillai*, (1905) 15 M.L.J. 126: I.L.R. 28 Mad. 473: (F.B.), explained.

Appeal against the Order of the Court of the Subordinate Judge of Mayavaram dated 19th December, 1938 and made in A. S. No. 76 of 1938 preferred against the order dated 8th August, 1938 (in E. P. No. 149 of 1938 in O. S. No. 181 of 1931, District Munsif's Court, Mayavaram)..

K. Bhashyam and *T. R. Srinivasan* for Appellant.

K. S. Sankara Aiyar and *M. S. Venkatarama Aiyar* for Respondents.

The Court delivered the following

JUDGMENT.—This appeal raises an interesting point in the law of limitation. It arises out of proceedings taken in execution of the final decree in a mortgage suit O. S. No. 181 of 1931. That suit was upon two mortgages of 1921, the more important of which was a usufructuary mortgage by the terms of which the mortgagee was put in possession of five shops and permitted to appropriate the total income from the shops in part payment of the interest due to him. The final decree was obtained on 18th September, 1933 and on 10th March, 1938, that is, 4½ years later, the legal representatives of the mortgagee-decree-holder brought the present application for execution. During that period he and they had remained in possession of the shops receiving the income therefrom as before. They rely on sub-S. (2) of S. 20 of the Limitation Act to bring their application within time and both the Courts below have held that the application is not barred. The question before me is whether that decision is right or wrong.

Sub-S. (2) runs as follows:

"Where mortgaged land is in the possession of the mortgagee, the receipt of the rent or produce of such land shall be deemed to be a payment for the purpose of sub-S. (1)."

It is contended for the appellant that the income received from 1933 to 1938 was not received by the mortgagee and the respondents in their capacity as mortgagees, but only in their capacity as decree-holders. It is contended for the respondents

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that the mere fact of the passing of the final decree does not affect the status of the mortgagee who remains as such a mortgagee after the decree as before. It is not disputed that from the date of the final decree the decree-holder was entitled to interest at only 6 per cent. and not according to the terms of the mortgage bonds; and also that he was entitled to this interest not upon the amount borrowed on the bonds, but upon the total amount declared to be due in the final decree.

I think the contention of the appellant in this appeal must prevail. In *Sundar Koer* v. *Rai Sham Krishen*[1], the effect of the provisions of a mortgage decree is considered and it is pointed out that when the mortgaged property is not redeemed within the time allowed the matter passes:

"From the domain of contract to that of judgment, and the rights of the mortgagee henceforth depend not upon the contents of his bond, but upon the directions in the decree."

It is also pointed out that the practice of allowing interest in the decree upon the aggregate sum then found due is justifiable only upon the assumption that the mortgagee is now treated as a decree-holder or judgment-creditor. In *Ellarayyan* v. *Nagaswami Ayyar*[2], it was held that when a final decree for sale was obtained by a mortgagee who continued in possession without executing it, the mortgagor was debarred on the principle of *res judicata* from instituting a suit for redemption. On page 703 it is pointed out that payments made before a final decree are payments by a mortgagor; payments made after it are by a judgment-debtor.

Now it is true that in neither of these cases just quoted was any question of limitation in issue, but I think nevertheless, that they are of primary importance in the decision of this appeal. What, after all, is the principle underlying the law of limitation? Surely it is this—that a claimant must take action within the time prescribed by law but that that time can be extended by some action on the part of his opponent who acknowledges the claim. The most common form which this action takes is that of payment. Now the receipt of rent by a mortgagee in possession is not payment by the mortgagor in the ordinary sense of that word. S. 20 says that it shall be deemed to be

1. (1906) 17 M.L.J. 43: L.R. 34 I.A. 9: I.L.R. 34 Cal. 150 at 161 (P.C.).
2. (1926) 50 M.L.J. 612: I.L.R. 49 Mad. 691.

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payment. Why? Clearly, I think, because the mortgagor has himself consented to it in his contract with the mortgagee. It is thus an acknowledgment, continually repeated so long as the contract is in force, by the mortgagor of the mortgagee's claim under the mortgage. But a final decree puts an end to the contract and in regard to payment substitutes new terms to regulate the rights of the parties. It is no longer open to the mortgagee, who has become the decree-holder, to appropriate the income of the mortgaged property towards his interest. That interest is limited to 6 per cent., and he must recover it by sale of the mortgaged property. If he remains in possession and appropriates to himself the income of the mortgaged property that is no longer an action to which the mortgagor, who is now the judgment-debtor, has consented—and is therefore in no sense any acknowledgment by him. It can be regarded in law as the action of the mortgagee-decree-holder alone and nothing that a claimant himself does can avail him to extend his period of limitation. I am of opinion therefore that S. 20 cannot successfully be called in aid by the respondents on the facts of this case.

I need refer only briefly in conclusion to an authority cited for the respondents, *Vaidhinadasamy Aiyar* v. *Somasundram Pillai*[1]. This ruling also does not deal directly with any question of limitation, being concerned with the question of the adjustment of a decree under what is now O. 21, r. 2, but on page 478 occur these words:

> "Reference was next made to the case of a mortgagee in possession of the mortgaged property and in receipt of the usufruct even after the mortgage decree was passed. No doubt under S. 20 of the Limitation Act such receipts are treated as payments to the mortgagee."

Now this is of course *obiter dictum*, but being the dictum of a Full Bench of three Judges is entitled to the very greatest respect and might well be followed if it applied to the facts of the present case. I do not think that it does so apply. According to the law as then in force the equivalent of what is now the final decree in a mortgage suit was then an order absolute for sale. In the Order of Reference on page 474 nothing is said about any such order absolute, and it may, I think, be assumed that no such order had been passed. I do not therefore

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1. (1905) 15 M.L.J. 126: I.L.R. 28 Mad. 473 (F.B.).

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find any obstacle in *Vaidhinadasamy Ayyar* v. *Somasundram Pillai*,[1] to my holding, for the reasons already given that S. 20 does not save the present application. In the result this appeal must be allowed, the order of the lower appellate Court set aside, and the respondents' execution application dismissed with costs throughout.

Leave granted.

K. C.

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Ordinary Original Civil Jurisdiction.]

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, MR. JUSTICE KING AND MR. JUSTICE PATANJALI SASTRI.

The Commissioner of Income-tax, Madras .. *Petitioner**

v.

S. M. S. Karuppiah Pillai, Madura .. *Respondent.*

F.B. Commissioner of Income-tax, Madras v. Karuppiah Pillai.

Income-tax Act (XI of 1922), Ss. 26 and 44—Continuation of business by a partner after retirement of co-partner—Whether "succession" to the business—Liability to assessment for ex-partner's share of profits.

On 16th September, 1935, the assessee and one *V* entered into a partnership for the production and exhibition of a cinema film. In May, 1936, *V* retired and was paid an amount for his share of profits. Thereafter the film was exhibited by the assessee for his own benefit. On a question as to the liability of the assessee to assessment in respect of the amount of profits paid to the ex-partner,

Held, a firm for the purpose of assessment to income-tax is an entity distinct from the partners, and where a partner carries on the business of the partnership after dissolution he does "succeed" within the meaning of S. 26 (2) to the partnership business.

Karuppaswami Moopanar v. *Commissioner of Income-tax, Madras*, (1934) 2 I.T.R. 284: 7 I.T.C. 283 and *Commissioner of Income-tax, Madras* v. *Muthukaruppan Chettiar*, (1939) 1 M.L.J. 482: I.L.R. (1939) Mad. 269 (F.B.) re-affirmed. *Kesava Rao* v. *Commissioner of Income-tax, Madras*, (1935) 70 M.L.J. 13: I.L.R. 59 Mad. 377, (F.B.) distinguished.

S. 44 only applies only where there has been a discontinuance of the business which is not the case here. Consequently the assessee is liable to be assessed in respect of the ex-partner's share of profits.

Reference under S. 66 (2) of the Indian Income-tax Act (XI of 1922) by the Commissioner of Income-tax, Madras.

K. V. Sesha Aiyangar for the Commissioner.

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1. (1905) 15 M.L.J. 126: I.L.R. 28 Mad. 473 (F.B.).

* O. P. No. 110 of 1940. 25th September, 1940.

V. Ramaswami Aiyar for the assessee.

The judgment of the Court was delivered by

The Chief Justice.—The main question raised in this reference is whether a partner who continues the partnership business after the dissolution of the partnership succeeds to the business within the meaning of S. 26 (2) of the Indian Income-tax Act, 1922. On the 16th September, 1935, the assessee and one Venkatarama Aiyar entered into a partnership for the production and exhibition of a cinema film called "Pathi Bhakthi". The partnership continued until the month of May of the following year, when Venkatarama Aiyar retired from the partnership and was paid the amount of the profits which represented his share, namely, the sum of Rs. 9,524. Thereafter the film was exhibited by the assessee for his own benefit. For the assessment year 1937-38 the Income-tax authorities assessed Venkatarama Aiyar in respect of this sum of Rs. 9,524 and he paid the tax, but later the Income-tax authorities considered that they were wrong in so doing, and to have the question settled, the Commissioner of Income-tax has, under the provisions of S. 66 (2) of the Act, referred the following question:—

"Whether the provisions of S. 26 (1) or S. 26 (2) of the Act are applicable to this case and the petitioner is liable to be assessed on the sum of Rs. 9,524 which represents the ex-partner's share of the profits of the film business."

In his statement of the case the Commissioner has very properly stated that should the Court answer this question against the assessee he would exclude the sum of Rs. 9,524 from the assessment of Venkatarama Aiyar, who, of course, would thereupon be entitled to a refund.

S. 26 (2) reads as follows:

"Where at the time of making an assessment under S. 23, it is found that the person carrying on any business, profession or vocation has been succeeded in such capacity by another person, the assessment shall be made on such person succeeding, as if he had been carrying on the business, profession or vocation throughout the previous year, and as if he had received the whole of the profits for that year."

For the assessee it is said that inasmuch as he was a partner in the business of exhibiting this film before he acquired the right to exhibit it for his sole benefit there could be no succession, because as part owner of the business he could not succeed to himself. This argument ignores the fact that a partner is not the partnership. A firm for the purposes of assessment to income-tax is an entity quite distinct from the

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partners who compose it. In two cases which have come before this Court it has been accepted that where a partner carries on the business of the partnership after dissolution he does "succeed" within the meaning of S. 26 (2). These cases are *Karuppaswami Moopanar* v. *Commissioner of Income-tax, Madras*[1] and *Commissioner of Income-tax, Madras* v. *Muthukaruppan Chettiar*[2]. For the assessee it has been suggested that the judgments in these cases cannot be regarded as deciding the question because this proposition was not disputed. It is true that the argument which has been addressed to this Court was not addressed to the Court in the two cases mentioned; but the cases cannot be ignored for this reason. Obviously it was not considered to be worth while taking the point. If the partnership is an entity distinct from the partners there must be succession in circumstances such as we have here. The Rangoon High Court took the same view in In re *The Commissioner of Income-tax, Burma* v. *N. N. Firm*[3] and the same view has been taken in England: see *Michael Faraday, Rodgers and Eller* v. *Carter*[4].

In the course of his arguments Mr. Ramaswami Aiyar has suggested that the decision of this Court in *Kesava Rao* v. *Commissioner of Income-tax, Madras*[5], has application here, but this cannot be accepted. There the Court was merely concerned with the question whether there could be succession within the meaning of S. 26 (2) in the case of the death of one member of a joint Hindu family. It was held that there could not be. It was not a matter of succession at all. It was a matter of survivorship. The family remained joint, notwithstanding the death of the member. In no sense of the word could it be said that there was succession or a change in the identity of the assessee.

It has been also argued on behalf of the assessee, that as Venkatarama Aiyar has paid the tax on the Rs. 9,524, there cannot be a fresh assessment by reason of the provisions of S. 44 of the Act. That section says:

"Where any business, profession or vocation carried on by a firm has been discontinued, every person who was at the time of such discontinuance

1. (1934) 2 I.T.R. 284: 7 I.T.C. 283.
2. (1939) 1 M.L.J. 482: I.L.R. (1939) Mad. 269: 7 I.T.R. 29 (F.B.).
3. (1933) I.L.R. 11 Rang. 501: 2 I.T.R. 85.
4. (1927) 11 Tax. Cases 565.
5. (1935) 70 M.L.J. 13: I.L.R. 59 Mad. 377: 3 I.T.R. 33J (F.B.).

a member of such firm shall be jointly and severally liable for the amount of the tax payable in respect of the income, profits and gains of the firm."

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This section only applies when there has been a discontinuance of the business, which is not the case here. The section says that if a business is discontinued the partners shall nevertheless be jointly and severally liable for the profits which had been earned. We are not concerned here with a case where there has been a discontinuance of the business. We are concerned with a case where the same business has been carried on by one of the partners, and carried on without any break. In such a case the section which is applicable is S. 26 (2) and not S. 44.

For the reasons indicated we answer the question referred in the affirmative. The Commissioner is entitled to his costs, Rs. 250.

K. S. *Reference answered.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

Yeddula Chinnabbi and others .. *Appellants* (Petitioners-Petitioners)*

v.

Yeddula Venkata Subbamma and another .. *Respondents (Respondents-Respondents).*

Chinnabbi v. Venkata Subbamma.

Madras Agriculturists' Relief Act (IV of 1938), S. 4 (h)—Maintenance allowance under a decree—Whether 'property' within the meaning of section.

The maintenance allowance decreed to a Hindu daughter is 'property, within the meaning of S. 4 (h) and a woman in receipt of such allowance is not entitled to the immunity afforded by that provision.

Case-law discussed.

Appeal against and petition under S. 115 of the Code of Civil Procedure to revise the order of the District Court of Cuddapah, dated 25th August, 1938 and made in I.A. No. 60 of 1938 in O.S. No. 17 of 1936.

Kasturi Seshagiri Rao for Appellants.

A. Bhujanga Rao and *D. R. Krishna Rao* for Respondents.

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*A. A. O. No. 500 of 1938 and C. R. P. No. 1561 of 1938. 4th November, 1940.

Chinnabbi *v.* Venkata Subbamma.

Patanjali Sastri, J.

The judgment of the Court was delivered by

Patanjali Sastri, J.—This is an appeal brought by the judgment-debtors from an order of the District Court of Cuddapah refusing to scale down the decree in O.S. No. 17 of 1936 on the file of that Court on the ground that the debt due to the respondents is excluded from the purview of the Agriculturists' Relief Act by S. 4, cl. (*h*) thereof.

The appellants contend that the exemption under that clause does not apply to the respondents as they own "other property," inasmuch as each of them is entitled under the decree in O.S. No. 20 of 1935 on the file of the Subordinate Judge's Court of Cuddapah to an allowance of Rs. 10 per mensem for her maintenance. The only question for determination is whether the right to receive this allowance can be regarded as "property".

The respondents are the daughters by the second wife of one Chinna Venkatasubba Reddi who gave a third share of his properties by his will to his daughter by the first wife, and died intestate in respect of the rest of his properties which were inherited by his third wife who survived him. The devisee brought the O.S. No. 20 of 1935 referred to above for partition and delivery of possession of her third share of the properties against the surviving widow and her daughter, and the respondents were also impleaded as defendants 3 and 4 as being in possession of some of the assets of their father. A decree for partition was duly made and paragraph 6 of that decree provided that:

"Defendants 3 and 4 by guardian will be given Rs. 240 per annum as maintenance at Rs. 120 each till each of them is married and joins her husband's family, from the date of plaint, that is, 24th July, 1933, in proportionate shares,"

and liberty was reserved to the parties in paragraph 9 to apply for further directions in the matter. It is now admitted that the first respondent is married and has joined her husband and, for that reason, is no longer entitled to the allowance payable under the decree. As she has not been proved to own any other property, she is clearly entitled to the immunity provided under S. 4 (*h*) of the Act and the appeal must fail so far as she is concerned. The question arises therefore only with reference to the claim of the appellants to have the decree scaled down against the second respondent.

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It is argued on behalf of this respondent that the right to receive the allowance under the decree cannot be regarded as "property" as such right being no more than a right to future maintenance is neither heritable nor transferable having regard to S. 6, Cl. (*dd*) of the Transfer of Property Act. Our attention was also drawn to S. 60 (1) (*n*) of the Code of Civil Procedure which provides that a right to future maintenance is not liable to attachment and sale in execution of decrees. These statutory provisions, however, do not, in our view, conclude the point at issue, for rights are readily conceivable which are neither transferable nor attachable but which are undoubtedly in the nature of property—*see* for instance S. 6 (*d*) of the Transfer of Property Act and S. 60 (1), (*a*) (*b*) and (*c*) of the Code of Civil Procedure. Still less is non-heritability a test, as a life estate or a widow's estate in immovable property is a well-known species of property. The term "property" is not defined in the Transfer of Property Act but it is one of very wide import, and there seems to be no obvious reason why the right of the second respondent to a monthly allowance of Rs. 10 payable under the decree should not be held to be" property". In *Harries* v. *Brown*[1], the Privy Council upheld an assignment of a monthly allowance of Rs. 50 bequeathed by a father to his daughter for her maintenance, and the numerous decisions in this country which had to consider the question whether the right to future maintenance is alienable, and, if so, under what circumstances, having regard to S. 6 (*d*) of the Transfer of Property Act before the introduction of the new cl. (*dd*) by the Amending Act of 1929, all proceeded on the assumption that such a right is "property," for, the wording of cl. (*d*) clearly postulates that the right or interest which is made inalienable thereunder is "an interest in property". In *Ranee Annapurni Nachiar* v. *Swaminatha Chettiar*[2], however, a Bench of this Court took the view that a widow's right to maintenance from her husband's estate where the amount is fixed by agreement or by decree is not property at all and that, therefore, S. 6 (*d*) did not affect an assignment of such right which they accordingly upheld. But this view has not been generally accepted and in the Full Bench case, *Subraya* v. *Krishna*[3], Oldfield, J., remarked with reference to that

1. (1901) L.R. 28 I.A. 159: I.L.R. 28 Cal. 621 (P.C.).
2. (1910) 20 M.L.J. 785: I.L.R. 34 Mad. 7.
3. (1923) 45 M.L.J. 533: I.L.R. 46 Mad. 659 (F.B.).

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decision:

"But with all respect, we have not been shown that this view has been taken elsewhere; it is inconsistent with the statutory exclusion of such a right from property liable to attachment; and, if it were acceptable, explanation would still be necessary as to the law, by which the validity of a transfer of what is not property is recognised or can be tested at all."

And Schwabe, C.J., observed:

"The right under a contract to a defined amount in cash or kind for future maintenance is, in my judgment, property under the enabling words of S. 6 of the Transfer of Property Act of 1882."

The learned Chief Justice drew a distinction between a right to future maintenance properly so called, that is, "the right to be maintained by the supply of clothing, board and lodging" and the right under a contract to receive a specified amount in cash or kind by way of maintenance, and expressed the view that the latter right was property, remarking that there was a divergence of opinion as to whether the former was property or not. In *Asad Ali Molla* v. *Haidar Ali*[1], Mookerjee, J., delivering the judgment of the Court held that where a claim to maintenance had been merged in a decree which also fixed the amount payable in that behalf, the decree was assignable whether the original claim was personal or not, and throughout the discussion it was assumed that such a right was in the nature of property. As already observed, the decisions which discuss whether the right to receive defined amounts periodically under a contract or a decree is one restricted in its enjoyment to the owner personally within the meaning of S. 6 (*d*) of the Transfer of Property Act, proceed on the same assumption, as no question under that clause could otherwise arise. The new Cl. (*dd*), no doubt, specifically provides that "a right to future maintenance, in whatsoever manner arising, secured or determined, cannot be transferred." But as already remarked, this does not affect the question whether such a right is in the nature of property or not. We are aware that in *Subraya* v. *Krishna*[2], the allowance in question was actually charged on immovable property, but the nature of the right was discussed in general, no point being made of the charge. Indeed, as pointed by Mookerjee, J., in *Tara Sundari Debi* v. *Saroda Charan Banerjee*[3], the existence of a charge has not much bearing on

1. (1910) I.L.R. 38 Cal. 13.
2. (1923) 45 M.L.J. 533: I.L.R. 46 Mad. 659 (F.B.).
3. (1910) 12 C.L.J. 146.

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the question:

"Because, if the allowance is regularly paid by the person liable, no question of enforcement of a charge upon any interest in immovable property arises; unless a default has been made, and arrears are due, there is no charge to enforce."

Reference was also made in the course of argument to the English case in In re *Robinson*[1], where it was held that alimony payable to a wife under a decree for judicial separation was:

"Not in the nature of property but only money paid by the order of the Court from time to time to provide for the maintenance of the wife."

We do not think that English cases relating to alimony are of much assistance in the determination of the question before us. Alimony, as is well known, is an allowance which the Court orders to be paid for the maintenance of the wife in consequence of a judicial separation, and depends from time to time on the discretion or approval of the Court which "may alter it or take it away whenever it pleases". Even in England such allowance has been distinguished from an annual sum secured to the wife by an order of Court under S. 32 of the Divorce and Matrimonial Causes Act, 1857, which has been held to be property—see *Harrison* v. *Harison*[2]. There is not much similarity between alimony which the Court allows or withdraws at its discretion during judicial separation and the right of an un-married daughter of a Hindu to maintenance out of his estate in the hands of his devisees or heirs. A Full Bench of this Court has held in *Subbayya* v. *Anantaramayya*[3], that even against the father the daughter's right to maintenance is not based merely on his natural obligation to maintain his children, but is based on her right or interest in the family property. After an elaborate examination of the original texts and decisions bearing on the subject, Ramesam, J., came to the conclusion that:

"The right of the daughter for maintenance up to the going to the husband's house and for marriage expenses is a present remnant of the right to a share. Therefore the right of the daughters in the father's lifetime, however much it cannot be enforced by partition, must still be described as a right or interest in the property." (See also *Cherutty* v. *Nagamparambil Ravu*.[4])

If such is the nature of the daughter's right to maintenance during her father's lifetime, her right on his death against per-

1. (1884) 27 Ch. D. 160.
2. 28 L.J. New Series P.D. and Ad. Dn. 28.
3. (1928) 57 M.L.J. 826: I.L.R. 53 Mad. 84 (F.B.).
4. (1940) 2 M.L.J. 358.

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sons who take his property must partake still more of the nature of an interest in property; for, then there is no question of personal relationship involving an obligation to maintain. We are therefore of opinion that English cases relating to alimony bear no analogy to the maintenance allowance decreed to a Hindu daughter against the heirs or devisees of her father.

We therefore hold that the second respondent owned "other property" on the material date within the meaning of S. 4, Cl. (*h*) of the Madras Agriculturists' Relief Act and is not entitled to the immunity afforded by that provision. The appeal is allowed as against the second respondent and the application is remitted to the lower Court for disposal in the light of this judgment. The appellant will have his costs of the appeal against that respondent. As against the first respondent the appeal is dismissed with costs. The Civil Revision Petition is dismissed without costs.

K. S. *Order varied.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, MR. JUSTICE KRISHNASWAMI AIYANGAR AND MR. JUSTICE HAPPELL.

In the matter of Sri R. K. Aiyar, Advocate, Madura.*

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In the matter of R. K. Aiyar.

Bar Councils Act, 1926, *r.* 12—*Legal practitioner—Addressing a letter to a clerk in a Magistrate's office asking that an application filed by him should be dealt with urgently—Propriety.*

It is improper for an advocate to address a letter to a clerk in a Magistrate's office asking that an application filed by him should be dealt with urgently. The proper course for a legal practitioner, if there was any delay, is to bring the matter to the notice of the presiding officer of the Court.

Case under S. 12 of the Indian Bar Councils Act, 1926 calling upon Sri R. K. Aiyar, Advocate, Madura, to show cause why he should not be dealt with under the disciplinary jurisdiction of the High Court in respect of the complaint of the Sub-Magistrate of Manapparai dated 16th March, 1940, stating that with a sinister motive he wrote a letter, couched in somewhat unusually endearing terms to the Magisterial clerk of the Sub-Magistrate's Court, Manapparai, in

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*R. C. No. 28 of 1940. 25th November, 1940.

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regard to the despatch of certain refund orders from that Court and that he was therefore guilty of grossly improper conduct in the discharge of his professional duty.

The Advocate-General in support of the Notice.

S. Krishnamurthi for the Respondent-Advocate.

The Order of the Court was delivered by

The Chief Justice.—The respondent is an Advocate practising in the Madura District. He has been charged with professional misconduct in that he wrote a letter to a clerk of the Sub-Magistrate of Manaparai in the Trichinopoly District asking in effect that the return of money,, jewels and a wrist watch to his clients should be dealt with urgently. They were entitled to the return of the money and the articles. In fact an application had been made to the District Magistrate for an order directing their return and this order had been passed. The letter complained of is dated 18th May, 1938 and is in these terms:

"My dear brother,

I pray that you will be blessed with welfare, riches and good luck. I have herewith enclosed a memo. Yesterday, I have sent a memo. You should immediately send the documents referred to in these two memos to the Treasury Office at Kulittalai (for reference and return); further, I request you much to send me immediately the order directing the return of money to the petitioners. You must excuse me for the trouble. I feel very grateful for the help rendered by you till now and for the same to be rendered in future. I pray that God will bless you with long life and prosperity."

The Sub-Magistrate opened the cover and it was in this way that the letter came to light. The inquiry into the respondent's conduct was conducted by the District Judge of Trichinopoly and he has submitted a report in which he has expressed the opinion that the respondent has not been guilty of professional misconduct. The District Judge has gone so far as to say that there was nothing improper on the part of the Advocate in requesting the clerk to expedite the despatch of the refund order to enable his clients "to get a refund of the money which they were legitimately entitled to get."

It is manifest that it is improper for an Advocate to address a letter to a clerk in a Magistrate's Office asking that an application filed by him should be dealt with urgently.. The proper course for the respondent was, if there was any delay, to bring the matter to the notice of the Sub-Magistrate himself.

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If such letters were allowed there is no knowing to what it might lead. We will assume that the respondent did not intend anything improper, but he must have realised that what he was doing was improper. He has apologised and therefore we consider that the case will be met by censuring him for his conduct. It must be clearly understood that in future a case of this nature will not be so leniently dealt with.

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Lahore.]

PRESENT:—VISCOUNT MAUGHAM, LORD RUSSELL OF KILLOWEN, LORD WRIGHT, SIR GEORGE RANKIN AND MR. M. R. JAYAKAR.

Punjab Co-operative Bank, Ltd., Amritsar .. *Appellant**

v.

Commissioner of Income-tax, Lahore .. *Respondent.*

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Punjab Co-operative Bank Ltd., Amritsar *v.* Commissioner of Income-tax, Lahore.

Government of India Act (1935), S. 205—Judgment of High Court on reference under Income-tax Act S. 66 (2)—High Court not expressly withholding certificate that a substantial question as to interpretation of Government of India Act involved—Direct appeal to Privy Council—Competence. Profit made by Bank on sale of securities, if assessable to income-tax.

No question of the jurisdiction of His Majesty in Council under S. 205 of the Government of India Act 1935, can arise unless there is a certificate that a substantial question as to the interpretation of the Government of India Act was involved, in which case the direct appeal lies to the Federal Court.

If in the absence of such a certificate it appears to the Board on an appeal that there is ground for thinking that there is a matter for the consideration of the High Court and that they ought to have given or to have withheld a certificate the Board ought to decline to hear the appeal until the High Court have had an opportunity of doing one or the other.

S. 205 on its true construction is dealing only with cases where there is a reasonable possibility that a substantial question of law as to the interpretation of the Act may arise, and the duty is imposed on the Judges of the High Court only in those cases.

Errol Mackay v. *Forbes*, (1940) 1 M.L.J. 64: I.L.R. (1940) 1 Cal. 286: L. R. 67 I.A. 64 (P.C.). relates to a case within the second of these propositions and must be confined to cases of that nature.

Accordingly where there is no possible ground for thinking that any question, still less a substantial question as to the Government of India Act 1935, can be involved in the case, an appeal lies to the Privy Council against a judgment of the High Court on a reference under S. 66 (2) of the Income-tax Act.

Profits made by a Bank on sale of securities are assessable to income-tax where such sale constitutes an act done in the carrying on of the banking

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* P.C. Appeal No. 71 of 1939. 22nd July, 1940.

business, and it is not necessary that the assessee should have carried on a separate or severable business of buying and selling securities with a view to profit.

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The facts appear sufficiently from their Lordships' judgment.

R. W. Needham and *N. E. Mustoe* for Appellant.

J. M. Millard Tucker and *W. Wallach* for Respondent.

22nd July, 1940. Their Lordships' judgment was delivered by

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VISCOUNT MAUGHAM.—This is an appeal from a judgment of the High Court of Judicature at Lahore dated 3rd February, 1938, delivered on a reference under S. 66 (2), Income-tax Act (II of 1922), by the Commissioner of Income-tax, Punjab, North-West Frontier and Delhi Provinces.

The appellant (hereinafter referred to as the Bank) is a joint stock company, incorporated in the year 1905, carrying on the business of banking. The objects for which the Bank was established are set out in para. 3 of its memorandum of association and include:

(*a*) To carry on in India and elsewhere the trade or business of banking in all its branches, and to transact and do all matters and things incidental thereto, or which may at any time hereafter be usual in connexion with the business of banking or dealing in money or securities for money.

Paragraph 82 (i) of the articles of association provides that the directors:

May invest funds of the company upon such securities or investments as they may think advisable; from time to time, vary such securities and investments, and convert the same, as occasion may require or as they may deem expedient, but they shall not invest or employ any part of the funds of the company in the purchases of its own shares.

The profits of the Bank derived from its business during the year 1935 were assessable to income-tax in the year 1936-7 which is the year of assessment involved in this appeal. The High Court on 3rd February, 1938, decided that on the facts stated in the statement of the case drawn up by the Commissioner of Income-tax under S. 66 (2), Income-tax Act, a question propounded by the Commissioner must be answered in the affirmative, with the result that the amount of Rs. 1,42,588 realised by the Bank, on the sale in 1935 of certain securities and shares over their cost price is taxable as part of the profits or gains of the business of the Bank which arose in 1935 (see S. 10, Income-tax Act). On 17th June, 1938, the High Court certified under S. 66-A,

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Income-tax Act, on the petition of the Bank that the case was a fit case for appeal to His Majesty in Council. As it happened the two learned Judges who gave this certificate were those who heard and decided the case on 3rd February, 1938.

On the appeal coming on for hearing before their Lordships a preliminary objection to the appeal was taken which has been elaborately argued, and it seems desirable in the first place to deal with this objection. It is based on the contention that no direct appeal now lies to His Majesty in Council from any judgment, decree or final order made by any High Court in British India unless that Court has recorded that it withholds the giving of a certificate that a substantial question of law as to the interpretation of the Government of India Act, 1935, is involved. That is said to be the effect of S. 205 of the Act, and reliance is placed on a decision of their Lordships in a recent case which must be considered later. S. 205 is in the following terms:

(1) An appeal shall lie to the Federal Court from any judgment, decree or final order of a High Court in British India, if the High Court certifies that the case involves a substantial question of law as to the interpretation of this Act or any Order in Council made thereunder, and it shall be the duty of every High Court in British India to consider in every case whether or not any such question is involved and of its own motion to give or withhold a certificate accordingly.

(2) Where such a certificate is given, any party in the case may appeal to the Federal Court on the ground that any such question as aforesaid has been wrongly decided, and on any ground on which that party could have appealed without special leave to His Majesty in Council if no such certificate had been given, and, with the leave of the Federal Court, on any other ground, and no direct appeal shall lie to His Majesty in Council, either with or without special leave.

The object of this section is plain. It is to ensure that in every proceeding where a judgment, decree or final order is made by any High Court in British India which involves a substantial question of law as to the interpretation of the Act or any Order in Council made thereunder (which for brevity will be referred to hereafter as the "special question of law") the appeal, if any, that is the direct appeal, shall lie to the Federal Court. The word "direct" is used because S. 208 makes provision for an appeal in such a case on certain conditions from a decision of the Federal Court to His Majesty in Council; but nothing turns on this for the present purpose. The means adopted in the section to carry out the above object are these: (1) The appeal is stated to lie to the Federal Court if

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the High Court certifies that the specified question of law is involved and is a substantial question. (2) A duty is imposed on the High Court of its own motion to give or to withhold a certificate that the specified question of law, being a substantial question, is involved. This part of sub-S. (1) contains some other important words which will be considered later. (3) Where such a certificate is given any party in the case may appeal to the Federal Court on defined grounds (sub-S. (2).) (4) Where such a certificate is given no (direct) appeal shall lie to His Majesty in Council even with special leave (sub-S. (2)).

It is clear that the section does not provide for a case where no such certificate is given, however plain it may be that it ought to have been given. There is no provision, express or implied, taking away from His Majesty in Council the right to entertain a direct appeal in such case, and *a fortiori* there is nothing taking away the right of direct appeal to His Majesty in Council in a case where no substantial question of law of the specified character could by any reasonable possibility arise. What then is the position if it becomes manifest to the Board that, by some mischance or inadvertence or forgetfulness, the High Court has neglected its duty under the latter part of sub-S. (1) to give a certificate in a case where the specified question of law is or may reasonably be involved? It is plain that it is for the High Court, not this Board to determine whether the question is involved and if so whether it is substantial. In such an event although the jurisdiction of His Majesty in Council has not been affected, since there has been no certificate, nevertheless there has been a dereliction of duty by the High Court, and the Board, in accordance with the principles on which it is accustomed to act in tendering advice to His Majesty, would not think it right to hear the appeal until a proper certificate has been obtained or it is on record that a certificate has been withheld.

The precise event in fact happened in the recent case in *Errol Mackay* v. *Oswald Forbes*[1]. It seemed to the Board that a question of interpretation arose under an Order in Council made by virtue of S. 293, Government of India Act, 1935. There was no certificate by the High Court. It was suggested by counsel for the appellants that the Court might have consi-

1. (1940) 1 M.L.J. 64: L.R. 67 I.A. 64: I.L.R. (1940) 1 Cal. 286: I.L.R. (1940) Kar. 72 (P.C.).

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dered S. 205 and might have decided to withhold a certificate, though that decision was not expressed. Their Lordships expressed the view that this was unlikely in that case, and in the absence of a certificate they thought that the appeal should be dismissed with costs. They added however that if the High Court should thereafter make an order withholding a certificate under S. 205 the appellants were to be at liberty to apply to His Majesty in Council to have the appeal restored. Their Lordships are of opinion that this order was perfectly correct, not because S. 205 took away the jurisdiction in a strict sense of His Majesty in Council but for the more general reason indicated above. They will add that the course taken of dismissing the appeal was no doubt to some extent due to the circumstance that the Board entertained little doubt that the certificate would be given. If the case had been one in which there was a real doubt whether the certificate would be given or withheld, a more lenient course might have been taken, and the appeal might have been directed to stand over until the High Court had either given a certificate or decided to withhold it.

It remains to consider what the position is and what course should be taken by the Board when the appeal is from the High Court and no such specified question of law can with any reasonable probability be thought to be involved, and where, not unnaturally, the High Court have neither granted a certificate nor recorded that a certificate is withheld. The first question here is whether in such a case S. 205 applies at all, and at this point it is necessary to examine the language in the latter part of sub-S. (1) in order to determine the nature of the duty imposed upon the High Court. The language is of a very comprehensive kind. The duty is to be that of "every High Court in British India". It is to consider "in every case" whether or not the specified question is involved. And finally the Court is "of its own motion" to give or to withhold a certificate accordingly. Their Lordships however are of opinion that this part of sub-S. (1) is directory in the sense in which that word is used in the well-known distinction between enactments or phrases in them which are mandatory or absolute and those which are merely directory. There are several reasons for this conclusion: first, the object of S. 205 is as above stated; secondly, the circumstance that the duty is imposed on the Judges of the High Court, persons occupying positions of great

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importance and dignity to whom mandatory clauses would not be addressed without strong reason; thirdly, that, in fact there is no provision whatever for imposing any penalty or deprivation of right on a litigant, if the High Court should neglect to comply with its judicial duty as laid down in the section. In other words, the duty is imposed on the Judges for the purpose of ensuring that, if the case involves the specified question of law, the High Court will carry out the intention of the section by giving a certificate which will ensure that the appeal, if any, shall be to the Federal Court; but there is no condition precedent imposed on an appeal to His Majesty in Council in the absence of a certificate. The responsible persons—in this case the Judges of the High Court—may be "blamable"—as Lord Blackburn observed in the instructive case in *Justices of Middlesex* v. *The Queen*[1]—but third parties have nothing to do with that.

If the sentence imposing the duty is only directory, as their Lordships think is clear for the reasons stated, an important consequence follows. It is a well-settled general rule that "an absolute enactment must be obeyed or fulfilled exactly, but it is sufficient if a directory enactment be obeyed or fulfilled substantially", *Woodward* v. *Sarsons*[2]; see also *Earl of Mountcashell* v. *Viscount O'Neill*[3]. It is sufficient if the plain object of the directory provision is carried out, *Walter* v. *Rumbal*[4]; *Jarvis* v. *Hemmings*[5]. If these principles are applied in the present case it will be apparent that the following alternative view arises; either S. 205 in imposing on the High Court the duty of giving or withholding a certificate is doing so only in cases where there is a reasonable possibility that the specified question arises or may arise, or, alternatively, the duty is one which need only be complied with in such a case. It is plain that in the vast majority of cases no such question can arise. It seems to their Lordships most difficult to believe that the Legislature was intending to lay on the Judges of every High Court an obligation as part of their judicial duties to record their intention to "withhold" a certificate in such cases as an ordinary judgment on a criminal trial or in a libel action or a decree or judgment in an every-day case, for the recovery of a

1. (1884) 9 A.C. 757 at 778.
2. (1875) L.R. 10 C.P. 733 at 746.
3. (1856) 5 H.L.C. 937 at 955.
4. (1695) 1 Ld. Raym. 53=91 E.R. 931.
5. (1912) 1 Ch. 462.

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trifling sum of money, for example, in a normal action for a debt. Their first duty is "to consider"; but only it would seem when there is in fact something to consider. Their Lordships have come to the conclusion that the duty imposed on the Judges by words of a directory character is one which arises only in a case where there is some reasonable ground for thinking that the specified question may be involved.

The conclusions on this matter of the construction of S. 205 are accordingly these: First, no question of the jurisdiction of His Majesty in Council can arise unless there is a certificate, in which case the direct appeal lies to the Federal Court. Secondly, if in the absence of a certificate it appears to the Board on an appeal that there is ground for thinking that there is a matter for the consideration of the High Court and that they ought to have given or to have withheld a certificate, the Board ought to decline to hear the appeal until the High Court have had an opportunity of doing one or the other. Thirdly, the section on its true construction is dealing only with cases where there is a reasonable possibility that the specified question may arise, and the duty is imposed on the Judges of the High Court only in those cases. Their Lordships desire to add that the case in *Errol Mackay* v. *Oswald Forbes*[1] related to a case within the second of these propositions. The remarks of the Board as regards the duties of the Judges of the High Court must be read as confined to cases of the nature which arose in that case; and in that connexion reference may be made to the remarks of Lord Halsbury in *Quinn* v. *Leatham*[2] that every judgment must be read as applicable to

> the particular facts proved or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed or qualified by the particular facts of the case in which such expressions are to be found.

It may be well to add that their Lordships do not differ from the opinion expressed in that case as to the duty of the Judges of the High Court in a case to which the section is applicable to record a determination to withhold a certificate if they think that is the right course. Preferably that should be done by the Judges who have heard the case; but it is not essential in every case and may sometimes be impossible, for

1. (1940) 1 M.L.J. 64: L.R. 67 I.A. 64: I.L.R. (1940) 1 Cal. 286: I.L.R. (1940) Kar. 72 (P.C.).
2. (1901) A.C. 495 at 506.

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example, when there are two Judges and they differ on the question whether the certificate should be given or withheld. It may be noted that in *Errol Mackay* v. *Oswald Forbes*[1] their Lordships provided for the event of the High Court making an order at some later date withholding the certificate in question, and that order doubtless could be made by Judges other than those who delivered the original judgment. It follows from the above observations that the preliminary objection fails, since in the present case there is no possible ground for thinking that any question, still less a substantial one, as to the interpretation of the Government of India Act, 1935 can be involved.

Two other matters were argued on the preliminary objection, first, whether a decision on a reference under S. 66 (2), Income-tax Act, is "a judgment, decree, or final order" within the meaning of those words in S. 205; secondly, whether the certificate given as above mentioned on 17th June 1935 under S. 66-A, Income-tax Act, is not a sufficient proof that the certificate under S. 205, Government of India Act (if the section was applicable) had been withheld. On these two questions their Lordships do not think it necessary to express any opinion. Coming now to the appeal by the Bank it may be observed that the High Court rightly appreciated that the question was ultimately one of fact to be decided on the findings of the Commissioner under S. 66 (2), Income-tax Act, and that the appellant Bank had to establish either that the Commissioner had misdirected himself on some question of law or that there was no sufficient evidence to justify his findings. Their Lordships note that the High Court, in deciding that neither of these points had been made good, examined and considered a number of cases most of which related to insurance companies and banks. Their Lordships do not propose to attempt to reconcile all these decisions and the various dicta which are to be found in the reports of them, which might indeed prove to be an impossible task; and they will add that the cases relating to insurance companies largely turn on the nature of the insurance business actually carried on and the way in which reserve funds have been set aside and dealt with.

In the present case it appears that on 31st December, 1934 the value of the investments of the Bank amounted to Rupees

1. (1940) 1 M.L.J. 64: L.R. 67 I.A. 64; I.L.R. 1940 1 Cal. 286: I.L.R. 1940 Kar. 72 (P C).

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50,88,550, mainly held in Indian Government securities which, being readily saleable, could if necessary be promptly realised in order to pay claims. During the year 1935 some 10 lacs of these Government securities and some shares were sold, and the profit made taking the differences between the cost price of the investments and the prices at which they were sold was Rs. 1,42,588. The grounds on which the Bank contends that the profit of Rupees 1,42,588 made on the sale of some of its securities in the year 1935 does not form part of the profits of its business of banking are succinctly stated thus, in the statement of the case: That the Bank had treated the investments in shares and securities as a reserve for emergencies and had resorted to their sale in the accounting period 1935 because they had in that year to meet heavy withdrawals of deposits and to deposit Rs. 2,66,000 with the Reserve Bank of India under the provisions of S. 42 (1), Reserve Bank of India Act 1934 (No. 11 of 1934). The Bank claimed also that it did not "deal in shares and securities" and that therefore the profit made by the sale of shares and securities was not taxable.

In the statement the Commissioner finds that up to 1933 there was no sale of securities. The first sale took place on 30th November, 1934. On the other hand, he declines to accept the contention that the Bank had to sell the securities in order to meet heavy withdrawals of deposits and to make the compulsory deposit with the Reserve Bank of India. He states from an examination of the books that it is clear that the profits realized by selling shares and securities were utilized in increasing the reserves. A general view of the financial position since 1932 as on 31st December of each year can be gathered from a table contained in the statement which is as follows:

Accounting year.	Assessment year.	Deposits in thousands.	Investments in thousands.	Total reserve in thousands.
		Rs.	Rs.	Rs.
1932 ..	1933-4 ..	11,543	4584	997
1933 ..	1934-5 ..	12 361	4931	1041
1934 ..	1935-6 ..	11,882	5088	1043
1935 ..	1936-7 ..	11,310	3859	1234

It is apparent that the decrease of deposits in the year 1935 as compared with the previous year is roughly 5 per cent. while the decrease in investments as between the two years is more

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than 20 per cent. So far from there being a finding that the sales of shares and securities were due to any special emergency, the Commissioner says that it is apparent that the Bank had been selling the shares and securities in order to take full advantage of the high prices prevailing in 1935. He was of opinion that the Bank had been "carrying on business in shares and securities since the closing months of 1934". This may well be the correct view and a sufficient ground for dismissing this appeal; but their Lordships do not wish to give any support to the contention that in order to render taxable profits realised on sale of investments in such a case as that before them it is necessary to establish that the taxpayer has been carrying on what may be called a separate business either of buying or selling investments or of merely realizing them.

The principle to be applied in such a case is now well settled. It was admirably stated in a Scottish case, *Californian Copper Syndicate* v. *Harris*[1] and the statement has been more than once approved both in the House of Lords and in the Judicial Committee: *See* for example *Commissioner of Taxes* v. *Melbourne Trust Ltd.*[2] Some dicta which appear to support the view that it is necessary to prove that the taxpayer has carried on a separate or severable business of buying and selling investments with a view to profit in order to establish that profits made on the sale of investments are taxable, for example, the dicta in the case of *Commissioners of Inland Revenue* v. *Scottish Automobile and General Insurance Co.*,[3] cannot now be relied on. It is well established to cite the exact words used in *Californian Copper Syndicate* v. *Harris*[1]

> that enhanced values obtained from realization or conversion of securities may be so assessable where what is done is not merely a realization or change of investment, but an act done in what is truly the carrying on, or carrying out, of a business.

In the ordinary case of a bank, the business consists in its essence of dealing with money and credit. Numerous depositors place their money with the bank often receiving a small rate of interest on it. A number of borrowers receive loans of a large part of these deposited funds at somewhat higher rates of interest. But the banker has always to keep enough cash or

1. (1904) 6 F. 894.
2. 1914 A.C. 1001.
3. 6 Tax. Cas. 381.

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easily realisable securities to meet any probable demand by the depositors. No doubt there will generally be loans to persons of undoubted solvency which can quickly be called in, but it may be very undesirable to use this second line of defence. If as in the present case some of the securities of the Bank are realised in order to meet withdrawals by depositors, it seems to their Lordships to be quite clear that this is a normal step in carrying on the banking business, or, in other words that it is an act done in "what is truly the carrying on" of the banking business. This, it appears to their Lordships, is the more appropriate and satisfactory ground for dealing with the question arising in the present case. It accords exactly with one of the findings in the statement of the Commissioner agreeing with the views both of the Income-tax Officer who first dealt with the case and of the Assistant Commissioner. He observed

> that the purchase and sale of shares and securities are so much linked with the deposits and withdrawals of clients that with the existing articles of association the purchase and sale of shares and securities are as much part of the assessee's business as receiving deposits from clients and paying them off are, and therefore, the profits which arise from the former transactions are as much business profits as the profits arising from the latter transactions are.

There can be no doubt that there is ample evidence to justify this view, and in their Lordships' opinion, as in that of the High Court, it is sufficient to dispose of this appeal. Their Lordships will accordingly humbly advise His Majesty that the appeal must be dismissed with costs.

K.S. *Appeal dismissed.*

Solicitors for Appellant: *Douglas Grant & Dold.*

Solicitors for Respondent: *Solicitor, India Office.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KING.

T. Sundaram Pillai .. *Appellant** (*Petitioner*)

v.

Kandaswami Pillai .. *Respondent* (*Respondent*).

Sundaram Pillai v. Kandaswami Pillai.

Civil Procedure Code (V of 1908), S. 13 Cls. (a), (b), (e) *and* (f)—*Applicability—Submission to jurisdiction—Filing written statement disputing jurisdiction of foreign Court—Decree passed after examining plaintiff—Whether* ex parte—*Decision based on untrue evidence—Whether can be said to be vitiated by fraud—Claim for recovery of money spent on minor's*

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* C.M.S.A. No. 82 of 1939. 8th October, 1940.

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marriage—Whether repugnant to British Indian Law—Contract Act (IX of 1872), S. 68.

The action of a defendant in filing a written statement in a foreign Court and attacking the jurisdiction of that Court amounts to submission to its jurisdiction, as by such a course he is asking the Court to decide a point in controversy between himself and the plaintiff, and the first clause of S. 13 Civil Procedure Code, will not apply to such a case.

Harris v. *Taylor*, L.R. (1915) 2 K.B. 580, relied on.

Where the defendant files his written statement raising various issues in the foreign Court, and a decree is given by the Court after the plaintiff has actually been examined in the witness box, it cannot be contended by the defendant that the decision is an *ex parte* decision and not one on the merits of the case.

It cannot be argued that merely because a plaintiff obtains a decree upon evidence which is believed by the Court, but which in fact is not true, he has obtained the decree by fraud. In order to attract Cl. (*e*) of S. 13 of the Code there must be fraud connected with the procedure in the suit itself.

Where the plaintiff sued in the foreign Court for recovery of a certain sum of money from the defendants who were then above the age of 18 years but were minors under the British Indian Law as guardians had been appointed for them under the Guardian and Wards Act and they were below 21 years, and the claim was based on the ground that the money had been expended on the first defendant's marriage, and the plaintiff pleaded an agreement to repay on the part of the defendants and also asserted his right under the law to be reimbursed, and the suit was decreed,

Held, that the claim in the foreign Court was founded partly on a breach of the Contract Act and partly upon a claim under S. 68 of the Contract Act, and the plaintiff could not be prevented by Cl. (*f*) of S. 13 of the Code from executing the foreign decree in British India.

Appeal against the order of the Court of the Subordinate Judge of Ramnad at Madura, dated 12th December, 1938 and made in A. S. No. 103 of 1938 preferred against the order of the Court of the District Munsif of Sattur in E. P. No. 78 of 1937 in O.S. No. 1310 of 1104 on the file of the Court of the Additional District Munsif of Trivandrum.

T. R. Srinivasa Aiyangar and *E. A. Viswanathan* for Appellant.

P. V. Rajamannar and *K. Subba Rao* for Respondent.

The Court delivered the following

JUDGMENT.—The appellant in this case is the holder of a decree obtained in the Court of the District Munsif of Trivandrum against two defendants. The first defendant was married to the appellant's daughter and the appellant in filing his suit in Trivandrum alleged that he had furnished the money to pay for the expenses of this marriage. He alleged further that both the first defendant and his elder brother the second defendant had

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promised to repay that money to him. The first defendant did not contest his plaint in Trivandrum. The second defendant after being first set *ex parte* had the *ex parte* order set aside and then filed a written statement in which he attacked the plaintiff's claim in a number of ways one of which was by questioning the jurisdiction of the Trivandrum Court. After filing the written statement however he withdrew from further opposition and the result was that a decree was passed in favour of the present appellant against both the defendants. In 1937 the appellant applied in the Court of the District Munsif of Sattur, Ramnad District, to execute the decree which he had thus obtained in Trivandrum against a joint family property in the hands of the second defendant who is the respondent in this appeal. The respondent resisted this application on the ground that under S. 13 of the Code of Civil Procedure the judgment of the Trivandrum Court could not be executed in British India. The learned District Munsif overruled this objection and ordered execution to proceed, but the learned Subordinate Judge of Ramnad upon appeal set aside the District Munsif's order and dismissed the appellant's application. This is an appeal against the order of the Subordinate Judge.

This question has to be decided entirely with reference to the clauses to be found in S. 13 of the Code of Civil Procedure. No less than four of these clauses are relied upon by the learned Advocate for the respondent in this appeal. It is stated for him that the decree of the District Munsif of Trivandrum was based upon a judgment pronounced by a Court which had not jurisdiction to deal with the suit, that it was not given on the merits of the case, that it had been obtained by fraud and that it sustained a claim founded upon a breach of the law in force in British India. These four clauses will have to be considered one by one.

The first objection raised is that the Trivandrum Court had no jurisdiction to try the suit as between the appellant and the respondent because they were residents in British India and the cause of action arose in British India. It is unnecessary however to decide whether the Court was in fact competent to deal with the suit if it is shown that the respondent had submitted to the Court's jurisdiction. It has already been stated that the respondent applied to the Court to set aside the *ex parte* order

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and then filed a written statement in which the claim of the plaintiff was attacked on various grounds including that of the jurisdiction of the Court. It has been held in *Harris* v. *Taylor*[1] that the action of a defendant in filing a written statement in Court and attacking the jurisdiction of the Court amounts to submission to that jurisdiction as he is asking the Court to decide a point in controversy between him and the plaintiff. Even therefore without any contest on the other issues in the suit a mere submission of the issue of jurisdiction to the decision of the Court amounts to the acceptance of that Court's jurisdiction within the meaning of *Harris* v. *Taylor*[1]. There are no rulings to the contrary in this country. It seems to me therefore that the District Munsif was right in holding that the first clause in S. 13 does not apply to the present case.

The second question is whether this decision has been given on the merits of the case. It is argued for the respondent that the decision is an *ex parte* decision and therefore is not one on the merits of the case. Here again the facts must be remembered that not only did the defendant file a written statement in which he raised various issues but that a decree was not given until the plaintiff had actually been examined in the witness box. No doubt his examination was formal and brief and was not subjected to cross-examination but it cannot I think be successfully argued that the decree was based upon the fact of the failure of the defendant to appear, and must be deemed to have been based upon the evidence given by the plaintiff. There is a clear authority which governs the facts of this case in *Venkatachalam Chetty* v. *Pichai Ammal*[2], and no authority to the contrary. That ruling is binding upon me and I find that here also the learned District Munsif was right in holding that the decision of the District Munsif of Trivandrum was one on the merits of the case.

Cl. (*e*) in S. 13 says that the judgment of a foreign Court cannot be executed in British India where it has been obtained by fraud. This is a point which was not apparently made before the learned District Munsif but in appeal before me the learned Advocate for the respondent relies upon it also. All that can be said on this point is that the case brought by the plaintiff was a false case and that the first defendant assisted

1. (1915) 2 K.B.D. 580.
2. 1920 M.W.N. 412.

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him in obtaining a decree by withdrawing from any resistance. It does not seem to me that the words 'by fraud' can possibly be applied to circumstances such as these. It cannot be argued that merely because a plaintiff obtains a decree upon evidence which is believed by the Court but which in fact is not true, he has obtained that decree by fraud. There must be fraud connected with the procedure in the suit itself to bring the matter within this clause. This clause also therefore does not apply to the present case.

Finally Cl. (*f*) in S. 13 says that the judgment of a foreign Court cannot be executed in British India where it sustains a claim founded on a breach of any law in force in British India. It has already been stated that the appellant asserted in his plaint in Trivandrum that both the defendants had promised to repay him the amount which he spent on the first defendant's marriage. Now both the defendants, at that time were minors according to the law in force in British India. For although they were above the age of 18 they had guardians appointed for them under the Guardian and Wards Act and therefore did not attain majority until the age of 21. It is argued therefore that the plaintiff appellant brought his case upon a contract which according to the Contract Act in force in British India he was not competent to make with the defendants and that this is a breach of the law as it is observed in this country. The learned District Munsif however points out that an examination of the plaint will show that it was not on this ground alone that the plaintiff brought his claim. No doubt he asserted that there was this agreement to repay him the money which he had spent, but he claimed repayment of that money independently of the agreement as money which was due from the joint family consisting of the two defendants to reimburse him for what he had spent upon a marriage which was a duty devolving upon that family. The learned District Munsif held accordingly that the appellant would have been able to sustain a good case for a decree under the provisions of S. 68 of the Contract Act. S. 68 of the Contract Act deals with necessaries and it is perhaps a little difficult at first sight to see why the marriage of a young man should be considered a 'necessary' within the meaning of that section. But I have been shown an authority of a Bench of the Patna High Court in *Pathak Kali Charan Ram* v. *Ram*

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*Devi Ram*1, which has applied S. 68 to very similar circumstances. In any case, whether that be the correct view to take of S. 68 or not is I think, of no importance in the decision of this appeal. Cl. (*f*) of S. 13 says 'where it sustains a claim founded on a breach of any law in force in British India'. This claim is founded partly perhaps upon a breach of the Contract Act, but also partly upon a claim under the Contract Act which in no way involves its breach. Whether that claim is a good or a bad one it is not for me now to decide. The District Munsif of Trivandrum has given a decree to the appellant and that decree sustains a claim which was not wholly founded upon a breach of the Contract Act. It seems to me therefore that the appellant cannot be prevented by Cl (*f*) of S. 13 from executing his decree in British India.

The result is that S. 13 provides no bar for the present execution application and this appeal must succeed and the order of the District Munsif be restored and execution be ordered to proceed. The respondent will pay all appellant's costs hitherto incurred.

(Leave to appeal is refused).

B.V.V. *Appeal allowed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, MR. JUSTICE VENKATARAMANA RAO, AND MR. JUSTICE HORWILL.

Chinatalapati Venkatanarasimharaju (now major) .. *Appellant** (*Defendant*)

v.

Surisetti Ramaswami and another .. *Respondents* (*Plaintiffs*).

F.B.

Venkatanarasimharaju v. Ramaswami

Easement—Right of way—Person using way over adjoining land for less than the prescriptive period—Obstruction to use of way by stranger—Action to restrain—Maintainability.

Where a right of way has been enjoyed for less than the prescriptive period the person enjoying it cannot ordinarily bring an action against a stranger who obstructs the use of the *de facto* easement, the principle being that a person cannot assert even against a trespasser a right which does not

1. (1917) 42 I.C. 963.

* S. A. No. 620 of 1937. 4th September, 1940.

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really interfere with enjoyment of his own property. It can only be maintained if the obstruction to user will have the effect of substantially depriving a person of the enjoyment of his property.

Narasappayyan v. Ganapati Rao, (1913) I.L.R. 38 Mad. 220 approved.

Kondappa Raja Naidu v. Devarakonda Suryanarayna, (1910) 20 M.L.J 803: I.L.R. 34 Mad. 173, distinguished.

Reference to the Full Bench in Appeal against the decree of the Court of the Subordinate Judge of Vizagapatam in A. S. No. 101 of 1936 preferred against the decree of the Court of the District Munsif of Yellamanchilli in O. S. No. 148 of 1933.

V. Govindarajachari and *B. V. Ramanarasu* for Appellants.

C. Rama Rao for Respondents.

The Court made the following

ORDER OF REFERENCE TO THE FULL BENCH.*

Krishnaswami Aiyangar, J.

Krishnaswami Aiyangar, J.—The appellant in this second appeal was the defendant in a suit instituted by the respondents for a declaration that they are entitled to a right of way along the passage marked *E* in the plan attached to the plaint and for an injunction restraining the defendant from interfering with their exercise of the right. According to the respondents the passage which is the subject-matter of the dispute between the parties is a portion of the gramakantam land of the village belonging to the Government. They alleged that from time immemorial the owners of the house which now belongs to them have been exercising the right. They further alleged that they anticipated obstruction to their right of way by the appellant and hence instituted the suit. The appellant denied that the passage *E* is a portion of the gramakantam and denied also the right of passage along it claimed by the respondents. The main issue framed in the suit by the District Munsif was whether the plaintiffs are entitled to the easement claimed. The learned District Munsif did not frame any issue as to the title to the property in which the passage *E* lay though as I have mentioned the plaintiffs claimed that the whole of the land in which that passage lay was gramakantam. Indeed he made it perfectly clear at about the end of paragraph 8 that in his opinion this question of title did not require to be decided and he accordingly gave no decision regarding it. He however considered the evidence on the question whether the plaintiffs had established user of the passage as of right for the statutory period and came to the conclusion that they had not made out their case. The suit was accordingly dismissed. The plaintiffs preferred an appeal which

*(30th July, 1940).

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was heard by the Subordinate Judge of Vizagapatam. In the appellate judgment two findings have been recorded both being findings of fact—namely, (1) that the site in which the passage *E* lay was not proved to be the property of the defendant and (2) that the plaintiffs had established long user for over 20 years of the passage *E* for egress and ingress to their house.

From the finding of the learned Judge that the site in which the passage lay did not belong to the defendant it followed that the title was in the Government, the land being gramakantam land. On this footing the learned Judge was of opinion that the respondents had not prescribed a right of easement as against the Government as there had been no enjoyment as of right for 60 years which is the period of limitation as against the Government. None the less he held that the appellant who was a mere stranger cannot obstruct the respondents who had had more than twenty years enjoyment of the right of way and who were in the process of acquiring a full easement right against the Government. The learned Judge observed as follows:

"The progress of the acquisition of easement cannot be obstructed by any other than the owner of the servient tenement and a mere stranger cannot obstruct any person in the exercise of what may be called an inchoate easement."

In support of this opinion he relied upon the observations of the learned Judges who decided the case reported in *Chinnasami Goundan* v. *Balasundara Mudaliar*[1].

On a reading of the case cited above it is clear that no decision was actually rendered on the precise question which arises for consideration in this Second Appeal. It may be that there is some inclination in favour of the view of the Subordinate Judge in this sentence which occurs at page 264:

"It may be a question whether a mere stranger can obstruct another person in the exercise of even what may be called an inchoate right of easement."

But it is fairly clear that a decision regarding the correctness of the proposition was not called for in the view that the learned Judges took of the facts of the case before them. Lower down in the same paragraph the Court observed:

"All that I am concerned to point out is that the case *cannot be compared* to that of a mere stranger interfering with the use of a right of way by a person who is in the process of acquiring it by a course of prescriptive enjoyment."

Mr. Govindarajachari appearing for the appellant has drawn my attention to the decision reported in *Narasappayya* v. *Ganapati Rao*[2], where Miller and Sadasiva Aiyar, JJ., held that unless an

1. (1934) 67 M.L.J. 262. 2. (1913) I.L.R. 38 Mad. 280.

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easement had ripened into a prescriptive one, mere enjoyment by the user for any length of time short of the full period of prescription gave no right for the enjoyer to maintain an action against any person infringing such a user. There is a reference in this decision to an earlier decision of a Bench of this Court reported in *Kondappa Raja Naidu* v. *Devarakonda Suryanarayana*[1]. The headnote in the latter case runs as follows:

"It is well settled law that a trespasser, in enjoyment of land for less than the statutory period, is entitled to be maintained in possession against all persons except the true owner. The same principle is applicable to incorporeal rights such as rights to light and water courses. A person in enjoyment of a water course for less than twenty years is entitled to protection in such enjoyment against persons who have no right to such water course."

In spite of the observations in *Narasappayya* v. *Ganapati Rao*[2], to the contrary I find it impossible to reconcile the two decisions or to escape the conclusion that they are really in conflict. It appears to me the only way in which this conflict is to be solved is by having the point referred to a Full Bench and obtaining an authoritative ruling and not by my preferring one view to the other. The papers will therefore be placed before my Lord the Chief Justice for orders as to the case being posted before a Full Bench, for a decision of the following question, namely, whether a person who is in the enjoyment of an easement but who has not acquired a title to it by prescription or otherwise, can maintain an action to prevent its obstruction by any person other than the owner of the servient tenement?

The Court, expressed the following

Leach, C. J.

OPINION.* *The Chief Justice.*—The question which has been referred reads as follows:

"Whether a person who is in the enjoyment of an easement, but who has not acquired a title to it by prescription or otherwise, can maintain an action to prevent its obstruction by any person other than the owner of the servient tenement?"

The considerations which may apply when the interference complained of has reference to the access of light and air or to support from adjoining land may not apply when the interference has reference to the use of a way over another's land and as this reference arises out of a case relating to an alleged right of way we consider that the question should be reframed in these terms:

"Can a person who has been using a particular way over land adjoining his, but for less than the prescriptive period, maintain an action to prevent a stranger from obstructing him using the way?"

1. (1910) 20 M.L.J. 803: I.L.R. 34 Mad. 173.
2. (1913) I.L.R. 38 Mad. 280.
*(4th September 1940)

In *Jootoor Acchanna* v. *Kanamala Venkatammal*[1], a Bench of this Court (Collins, C. J., and Parker, J.) held that a plaintiff who had received light through a window opening on vacant ground, but had not enjoyed the light sufficiently long to acquire an easement, was entitled to an injunction against a person who was not the owner of the vacant land, restraining him from building on it so as to cause obstruction to the light. The Court said:

"It was not necessary for plaintiff to establish prescriptive rights of easement against a wrong doer and that the mere fact of plaintiff's enjoyment is sufficient to entitle him to an injunction"

The authority for this statement was the well known case of *Jeffries* v. *Williams*[2], where Parke B., observed:

"If a house is *de facto* supported by the soil of a neighbour, this appears to us to be sufficient title against any one but that neighbour, or one claiming under him. Just as one who should prop his house up by a shore resting on his neighbour's ground, would have a right of action against a stranger, who by removing it, causes the house to fall; but none against his neighbour, or one authorized by the neighbour to do so, if he took it away and caused the same damage."

The strict form of pleading of the olden days was an important factor in the decision in *Jeffries* v. *Williams*[2], but nevertheless the case established the principle that a person without title cannot interfere with the enjoyment of property by one whose title does not even extend beyond possession. *Jeffries* v. *Williams*[2], cannot, however, be read as laying down the proposition that there is in the person in possession the right of action against a stranger who interferes with the acquisition of an easement which is not essential for the enjoyment of the property possessed. Interference with the normal enjoyment of the property is the essence of the decision.

What the Court is called upon to decide in this case is whether a person who has been in the habit of using a way over his neighbour's land, but has not acquired an easement, can prevent a stranger obstructing his user of the way. There is no direct authority to be found either in the English or in the Indian decisions, but there are emphatic statements against the maintenance of such an action to be found in "The Common Law" by Holmes, in Salmond on "The Law of Torts" and in

1. (1895) 5 M.L.J. 24.
2. (1850) 5 Ex. 792: 155 E.R. 347.

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Pollock on "Torts". Holmes takes the case of a way used *de facto* for four years, but in which no easement has been acquired, and asks whether the possessor of the quasi-dominant tenement would be protected in his use as against third persons. He says:

"It is conceivable that he should be, but I believe that he would not[1]."

At p. 354 we have this passage:

"A way, until it becomes a right of way, is just as little susceptible of being held by a possessory title as a Contract."

And at p. 382 this:

"But, as has been said before, the Common Law does not recognise possession of a way. A man who has used a way ten years without title cannot sue even a stranger for stopping it. He was a trespasser at the beginning, he is nothing but a trespasser still. There must exist a right against the servient owner before there is a right against anybody else."

Salmond[2], says that the rule in *Jeffries* v. *Williams*[3] and *Bibby* v. *Carter*[4], the latter case followed *Jeffries* v. *Williams*[3], cannot be extended

"to cover all cases of the *de facto* enjoyment of servitudes. It cannot be the law that a mere trespasser who has been in the habit of crossing another man's land can sue a stranger for an act which obstructs his use of this *de facto* easement. Nor can it be supposed that a poacher can sue a stranger who by polluting the water of a stream has interfered with his practice of catching fish therein."

Having put the question as to what forms of *de facto* possession the principle recognised in *Jeffries* v. *Williams*[3], does apply, Salmond submits that the true principle is this (p. 259):

"As against strangers the possessor of land is entitled to the use and enjoyment of it free from all harmful interference due to acts done on the adjoining land; and all such interference by a stranger is actionable, even though had it been done by the lawful owner of the adjoining land it would have been *damnum sine injuria* because of the absence of any acquired servitude making it illegal. Where, on the other hand, the act complained of has produced no harmful effects upon the plaintiff's land, it is necessary for him to plead and prove, even against a stranger, that he has a legal right to the benefit of which he complains that he has been deprived."

In dealing with wrongs to easement and other incorporeal rights in property, Pollock says (the 14th edition, p. 99):

"The enjoyment which may in time ripen into an easement is not possession, and gives no possessory right before the due time is fulfilled."

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1. "The Common Law" by Holmes at p. 241.
2. Salmond on the Law of Torts, 8th edition, p. 259.
3. (1850) 5 Ex. 792: 155 E.R. 347.
4. (1859) 4 H. and N. 153: 157 E.R. 795.

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and proceeds to quote the passage from Holmes which says,

"A man who has used a way ten years without title cannot sue even a stranger for stopping it."

Later he says (the 14th edition p. 300):

"*De facto* enjoyment does not even provisionally create any substantive right, but is material only as an incident in the proof of title."

There are here strong expressions of opinion that where the right of way has been enjoyed for less than the prescriptive period the person enjoying it cannot bring an action against a stranger who obstructs the use of the *de facto* easement, the principle being that a person cannot assert even against a trespasser a right which does not really interfere with enjoyment of his own property. It is conceivable that a case might arise where the principle involved in *Jeffries* v. *Williams*[1], could be appropriately applied, but it would be a very exceptional one. Take for instance, the case where as the result of some catastrophe access to land could only be obtained over the land of another. If a stranger attempted to prevent the possessor of the land so cut off from gaining access to his land the Court would surely interfere, as the stranger would be interfering with the enjoyment of the land.

At this stage it will be convenient to refer to two decisions of this Court which are in conflict and in consequence have given rise to this reference. In *Kondappa Raja Naidu* v. *Devarakonda Suryanarayana*[2], Benson and Krishnaswami Aiyar, JJ., after observing that it was well settled law that if any trespasser was in enjoyment of land for less than the statutory period he would be entitled to protect that possession against any one but the true owner, went on to say that they did not think that there was any distinction in principle, because the right to be protected was in the nature of an incorporeal right in process of acquisition. This statement is certainly open to strong criticism and it was criticised in *Narasappaya* v. *Ganapati Rao*[3], but as pointed out in that case, *Kondapa Raja Naidu* v. *Devarakonda Suryanarayana*[2], can be supported on the ground that the plaintiff was in possession of the channel which had been obstructed and having a possessory title had a

1. (1850) 5 Ex. 792: 155 E.R. 347.
2. (1910) 20 M.L.J. 803: I.L.R. 34 Mad 173.
3. (1913) I.L.R. 38 Mad. 280.

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cause of action against the defendant for obstruction. In *Narasappaya* v. *Ganapati Rao*[1], Miller and Sadasiva Aiyar, JJ., held that mere enjoyment of an easement for any length of time short of the full period of prescription gave no right of action against a person obstructing the user. In that case the plaintiff sought an injunction preventing the defendants from cutting a channel from a tank from which he watered some of his fields, so as to deprive him of the water. The District Munsif granted the injunction, but this was dissolved by the District Judge, who held that the plaintiff had no right to the water of the tank, though he had been in the habit of taking the water through a channel for some years. A second appeal was filed to this Court and the learned Judges upheld the decision of the District Judge. I regard the decision as being a correct decision. It was not a case where the plaintiff was in physical possession of the channel from the tank, but a case where the defendants were claiming a right to water which they did not possess.

In my opinion where a right of way has not been acquired by enjoyment for the prescriptive period there is ordinarily no right of action for interference. In a very exceptional case where access to the plaintiff's land would otherwise be cut off altogether a suit might be maintained against a stranger on the principle propounded in *Jeffries* v. *Williams*[2], but not otherwise.

The answer that I would give to the question referred in its altered form is that an action cannot be maintained in ordinary circumstances. It can only be maintained if the obstruction to user will have the effect of substantially depriving a person of the enjoyment of his property. To avoid any misunderstanding I would add that the Court is not dealing with the rights of the villagers to pass over gramakantam land.

Venkataramana Rao J.—I agree.

Horwill J.—I also agree.

K. S. *Reference answered.*

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1. (1913) I.L.R. 38 Mad. 280.
2. (1850) 5 Ex. 792: 155 E.R. 347.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, AND MR. JUSTICE KRISHNASWAMI AIYANGAR.

Gourochandra Dyano Sumanto .. *Appellant** (*Respondent*)

v.

Krishnacharana Padhi, minor by next friend Chinna Padhiyani.. *Respondent* (*Appellant*).

Gouro-chandra Dyano Sumanto *v.* Krishna-charana Padhi.

Negotiable Instruments Act (*XXVI of* 1881). *S.* 87—*Promissory note—Alteration of dates of execution of document and indorsement of interest paid—Plaintiff not guilty of any complicity—If S.* 87 *applicable.*

S. 87 would only apply to cases of fraudulent alteration by a party and to cases where due to his negligence it becomes possible for a stranger to make the alteration.

(Decision of Abdur Rahman, J., reported in *Krishnacharana Padhi* v *Gourochandra Dyano Sumanto*, (1939) 2 M.L.J. 686, affirmed).

Appeal under Cl. 15 of the Letters Patent against the judgment of the Honourable Mr. Justice Abdur Rahman, dated 2nd August, 1939, and passed in S. A. No. 457 of 1936 preferred to the High Court against the decree of the District Judge of Ganjam in A. S. No. 84 of 1935 (O. S. No. 399 of 1934, District Munsif's Court, Aska).

B. Jagannatha Das for Appellant.

B. V. Ramanarasu for Respondent.

The Court delivered the following

JUDGMENT. *The Chief Justice.*—The question raised in this appeal is whether the holder of a promissory note is affected by a material alteration in the instrument when the alteration has been made by a stranger and there has been no fraud or laches on the part of the holder. On the 15th October, 1928, the appellant executed a promissory note in favour of the adoptive father of the respondent who is a minor. The father died in 1929, being survived by his wife in addition to the respondent, who continued to live with his adoptive mother who is his legal guardian. On the 12th October, 1931, the appellant paid Rs. 10 on account of the debt due on the instrument and the fact of payment was endorsed on the instrument. On the 22nd October, 1934, the respondent, through his mother filed a suit to enforce payment of the amount then due. It was pleaded by the appellant that there were two material alterations in the note, and it is now accepted by the respondent that the Leach, C.J.

* L. P. A. No. 64 of 1939. 11th November, 1940.

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plea was justified. The alterations consisted in the changing of the date of the promissory note from the 15th October, 1928 to the 25th October, 1928, and the date of the endorsement from the 12th October, 1931 to the 22nd October, 1931. The appellant's case was that these alterations were made by the natural father of the respondent. The District Munsif of Aska, who tried the suit, found that the note had been materially altered, but in his opinion the evidence did not disclose, who was responsible for the alterations, although it appeared to him likely that they had been made by the respondent's natural father. As it had not been shown that the natural father was responsible the District Munsif decreed the suit with costs. The respondent appealed to the District Court of Ganjam. The District Judge found as a fact that the natural father had made the alterations and held that as the result the respondent was not entitled to sue upon it. Accordingly he allowed the appeal and dismissed the suit. The respondent then appealed to this Court, and his appeal was heard by Abdur Rahman, J., who restored the decree of the District Munsif. The learned Judge considered that there was no evidence on the record on which it could be held that the natural father had made the alterations. In his opinion the District Judge had merely surmised this and the evidence did not warrant the surmise. The learned Judge considered that, as the respondent was in no way responsible for the alterations, he was not prejudiced by them and therefore, was entitled to maintain the suit. The learned Judge gave, however, a certificate under Cl. 15 of the Letters Patent, which has permited this further appeal.

It has not been suggested at any stage of the proceedings that the respondent or his guardian was responsible for the alterations in the promissory note nor has it been suggested that there has been negligence. Therefore it must be assumed that the promissory note was taken out of the custody of the guardian without her consent and without any failure of duty on her part. Whether the alterations were in fact made by the natural father of the respondent matters not. Even if the alterations had been made by him in the mistaken belief that he was helping his natural son, that would not in the circumstances of this case deprive the respondent of his right to sue. S. 87 of the Negotiable Instruments Act provides that any material

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alteration of a negotiable instrument renders it void as against any one who is a party to the instrument at the time of the making of the alteration and does not consent to it, unless the alteration was made in order to carry out the common intention of the original parties. It cannot be said that the appellant, the maker of the promissory note, consented to these alterations, but the section must be read in the light of authority and there is authority which says that in circumstances such as we have here an innocent holder of the instrument is not damnified by a material alteration.

At common law a person who has custody of a negotiable instrument is bound to take care to preserve it from alteration. If it is altered by a stranger as the result of the holder's negligence in allowing it to leave his custody, he must bear the consequences. In *Davidson* v. *Cooper*[1], Lord Denman said:

"The strictness of the rule on this subject, as laid down in Pigot's case, can only be explained on the principle that a party who has the custody of an instrument made for his benefit, is bound to preserve it in its original state. It is highly important for preserving the purity of legal instruments that this principle should be borne in mind, and the rule adhered to. The party who may suffer has no right to complain, since there cannot be any alteration except through fraud, or laches on his part."

In that case, the Court did not, however, consider what would be the effect of a material alteration in an instrument made as the result of some accident or as the result of the malicious action of a stranger who happened to gain possession of it in spite of the exercise of all reasonable care on the part of the holder.

The question of the effect of a material alteration as the result of accident was considered by the Privy Council in *Hong Kong and Shanghai Bank* v. *Lo Lee Shi*[2], which was an appeal from the Supreme Court of Hong Kong. The Bills of Exchange Ordinance, 1883, of Hong Kong followed the terms of the Bills of Exchange Act 1882, to which S. 87 of the Negotiable Instruments Act corresponds. The wording of the Indian Act does not follow exactly the wording of the English Act, but so far as this case is concerned the difference in the language has no bearing. In the Hong Kong case the respondent received from her husband two bank notes for 500 dollars each; issued by the Hong Kong and Shanghai Banking Corporation. She placed them

1. (1844) 13 M. and W. 343: 153 E.R. 142.
2. (1928) A.C. 181.

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in the pocket of a garment and having forgotten where she had placed them she washed, dried, starched and ironed the garment. The result was that one of the bank notes was so defaced that the number could not be read and the bank refused to pay it. The question was whether the bank was right in its refusal. It was held by the Supreme Court that the Bank was bound to pay the note in the circumstances and this decision was upheld by the Judicial Committee. After reciting the terms of S. 64 of the Bills of Exchange Ordinance of Hong Kong, Lord Buckmaster, who delivered the judgment of the Board, observed:

> "Both the history of the law which this section enunciates and the terms of the section itself show that it relates only to alterations effected by the will of the person by whom or under whose directions they are made, and that it does not apply to a change due to pure accident. The alteration contemplated is one to which all parties might assent. It is not reasonable to assume parties assenting to a part of the document being effaced by the operations of a mouse, by the hot end of a cigarette, or by any of the other means by which accidental disfigurement can be effected. Again, the provision which excepts from the category of persons against whom the bill is avoided, a party who has 'himself made, authorized, or assented', to the alteration cannot reasonably apply to the ravages of a rat, a white ant, or any other animal pest. The fact that the change is accidental in itself negatives the possibility of the assent."

If a material alteration which is the result of an accident does not bring the instrument within the mischief of the section, surely the same must apply where a material alteration has been made by a meddlesome or maliciously minded stranger without the consent of the holder of the instrument and without any fraud or negligence on his part. To hold otherwise would mean the doing of grave injustice to an innocent party and this could never have been the intention of the Legislature in inserting S. 87 in the Negotiable Instruments Act.

For these reasons we dismiss the appeal with costs.

K. S. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

Polisetti Venkataratnam .. *Petitioner* (1st Respondent)*

v.

Venkataratnam v. Surya Rao.

Dhulipudi Surya Rao and others .. *Respondents (Petitioner, 2nd Respondent and nil).*

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* C. R. Ps. Nos. 933 to 935 of 1938. 4th October, 1940.

Venkataratnam
v.
Surya Rao.

Madras Agriculturists' Relief Act (IV of 1938), S. 23—Sale under Madras Estates Land Act on 10th December, 1937—Sale proceeds lying in Court and no sale certificate issued—Application on 9th April, 1938, under Act IV of 1938, S. 23—Maintainability.

S. 23 is applicable to sales in execution of any decree whereby immovable property, in which an agriculturist entitled to the benefits of the Act has an interest, has been sold on or after 1—10—1937, and if the application is made within 90 days of the commencement of the Act, the Court is obliged, if satisfied, that the applicant is entitled to the benefits of the Act, to set aside the sale after giving notice to the persons interested and hearing them. The absence in the section of a *non obstante* provision regarding what is contained in the Madras Estates Land Act, the absence of any necessity for confirmation of sale under the latter Act, and the absence of provisions in S. 23 regarding the setting aside of sales under the summary provisions contained in Ss. 112 to 118 of the Estates Land Act are not an indication that S. 23 would have no application to sales for arrears of rent. "Any decree" in S. 23 will include decrees for rent under the Estates Land Act.

The mere holding of a sale will not wipe off the arrears of rent. The arrears will remain outstanding until the proceeds of sale are paid to the landholder. Apart from the question whether the tenants were entitled to benefits under S. 15 regarding rent they are clearly entitled to the benefits of the Act under Ss. 8 and 9 regarding interest on costs.

Petitions under S. 115 of Act V of 1908 praying that the High Court will be pleased to revise the order of the Court of the Head Quarters Deputy Collector of Cocanada dated 19th May, 1938 and passed respectively in L. S. No. 1348 of 1934 in E.P. No. 34 of 1937, L.S. No. 27 of 1940 in E.P. No. 46 of 1937 and L.S. No. 22 of 1935 in E.P. No. 38 of 1937.

D. Narasaraju for Petitioner.

V. Suryanarayana and *A. Satyanarayana* for Respondents.

The judgment of the Court was delivered by

Wadsworth, J.

Wadsworth, J.—These Civil Revision Petitions raise the question whether S. 23 of the Madras Act IV of 1938 applies to sales in execution of decrees for arrears of rent under the Madras Estates Land Act.

The decree in each of these cases was passed in either 1934 or 1935. The sales were all held on the same date, 10th December, 1937. On 20th January, 1938, the tenants applied for challans with a view to payment of the decreed amounts but, instead of paying, on the following day they filed applications purporting to be under O. 21, r. 90, Civil Procedure Code, and S. 192 of the Estates Land Act, praying that the sales may be set aside on the ground of irregularity etc. Act IV of 1938 came into force in March, 1938 and on 9th April, 1938, when

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the sale proceeds were lying in Court and no sale certificate had been issued, the judgment-debtors withdrew their application under O. 21, r. 90, Civil Procedure Code, and instead filed applications under Ss. 15 and 23 of Act IV of 1938.

The main argument in these petitions is that S. 23 has no application to sales in execution of decrees for rent under the Madras Estates Land Act. In terms, the section appears to apply to sales in execution of any decree whereby immovable property in which an agriculturist has an interest has been sold on or after 1st October, 1937 and the application may be made by any judgment-debtor claiming to be an agriculturist entitled to the benefits of the Act and if the application is made within 90 days of the commencement of the Act, the Court is obliged, if satisfied, that the applicant is an agriculturist entitled to the benefits of the Act, to set aside the sale after giving notice to the persons interested and hearing them. The argument that this section, which appears to embrace all decrees, excluded decrees under the Madras Estates Land Act, is largely rested on the fact that though the section has a *non obstante* provision regarding what is contained in the Code of Civil Procedure, there is no similar provision regarding what is contained in the Madras Estates Land Act. It is also suggested that the words, 'notwithstanding that the sale has been confirmed' seem to contemplate a sale under the Code of Civil Procedure and not a sale under the Madras Estates Land Act, with regard to which S. 124 does not require any confirmation order but provides merely for the grant of a certificate of sale if no application has been made to set aside the sale under S. 131. It is also pointed out that S. 23 contains no provision regarding the setting aside of sales under the summary provisions contained in Ss. 112 to 118 of the Estates Land Act and it is contended that it is not likely that the Legislature would have given relief in the case of one class of sales under the Act if they were not giving relief under the other class. A further contention was based on the terms of S. 22 which deals with sales of movable property, but makes no provision for dealing with such sales if the judgment-debtor is entitled to the privileges under S. 15 of the Act.

Now, there are, to our mind, many arguments which can be advanced against these contentions which Mr. Narasa Raju has put forward. In the first place, S. 15 deals with arrears of

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rent not only under the Madras Estates Land Act which prescribes a special machinery for execution, but also under the Malabar Tenancy Act with reference to which the ordinary procedure applies and the ordinary Civil Courts have jurisdiction. It cannot be contended that the non-mention of the Madras Estates Land Act in S. 23 is any indication that S. 23 would have no application to sales for arrears of rent in the ordinary Civil Courts under the procedure laid down by the Civil Procedure Code. Moreover even a decree for rent under the Madras Estates Land Act may result in a sale by the ordinary Civil Courts under the Civil Procedure Code if that decree is transferred to the Civil Courts for execution. To accept the argument which has been advanced before us on the strength of the absence of any *non obstante* clause with reference to the Estates Land Act, would lead to the anomalous position that some sales in execution of decrees under the Estates Land Act would come within the purview of S. 23 of Act IV of 1938 and others would not; while sales in execution of decrees for rent under the Malabar Tenancy Act would be liable to be set aside under S. 23 though most sales in execution of decrees for rent under the Estates Land Act would escape. The argument based on S. 22 can have little force having regard to the position of sales under the Malabar Tenancy Act. No doubt, the procedure for scaling down rent has this difference from the procedure for scaling down an ordinary debt, in that it is conditional on a deposit by the person liable to pay. But the fact that the extent to which the decree will have to be scaled down may not be capable of being determined at the time when the sale is to be set aside, is not, in our opinion, a reason for refusing to apply S. 23 if in terms that section applies.

Our attention has been drawn to the difference between the wording of S. 23 and that of S. 19. S. 19 speaks of a decree for the repayment of a debt and by the definition of 'debt' this would not include a decree for the payment of rent. S. 23, however, has, the very wide term 'any decree' and it would require very strong indications of the intention of the Legislature to justify our interpreting the words 'any decree' to mean 'any decree excluding a decree under the Madras Estates Land Act.'

It has also been contended that S. 23 is only available to a judgment-debtor who is found to be entitled to the benefits of

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the Act and it is argued that in the case of a person liable to pay rent, the question whether he is entitled to the benefits of the Act will depend on (1) whether there is rent outstanding on the date of the commencement of the Act and, (2) whether he has paid in respect of the holding the rent due for fasli 1347 on or before the 30th September, 1938. It is suggested that because in these cases sales had been held and the purchase price was in deposit with the Collector, there was no 'rent' outstanding on the date of the commencement of the Act. We are unable to accept this contention. The mere holding of the sale will not, in our opinion, wipe off the arrears of rent. Those arrears will remain outstanding until the proceeds of the sale are paid to the landholder. Nor can it be contended that the judgment-debtors were not entitled to the benefit of S. 15 because on the date of their applications, they may not have paid the rent due for fasli 1347. This payment has by the terms of the second proviso to S. 15 to be made before the 30th September, 1938 and orders were passed on the present applications on 19th May, 1938. The question whether they will be entitled to the benefit of S. 15 when the Court proceeds to ascertain the amount due from them after setting aside the sale, will depend on whether they have or have not made the required deposit before the statutory date. On that point we have no information.

It seems to us clear that quite apart from the question whether the petitioners were entitled to the benefits of the Act in respect of S. 15, they were clearly entitled to the benefits of the Act in respect of the decree for interest on costs. No doubt, the definition of 'rent' includes rent covered by a decree, but the terms of S. 16 make it quite clear that costs awarded in a decree for rent are something quite apart from the rent. We have already held in *Palani Goundan* v. *Muthuswami Goundan*[1], (C. R. P. No. 1723 of 1938) that a decree for costs is liable to be scaled down under Ss. 8 and 9 as regards interest. It follows that even apart from the claim of the petitioners to be entitled to the benefits of the Act under S. 15 as regards rent, they were entitled to the benefits of the Act under Ss. 8 and 9 as regards interest on costs. The Court below therefore had no option but to set aside the sales on application.

1. (1940) 2 M.L.J. 707.

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In the result, therefore, these three petitions are dismissed with costs of the judgment-debtor-respondent. (One set).

Pleader's fee fixed at Rs. 69—Rs. 23 in each case.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PANDRANG ROW.

Velayudha Maistry and another .. *Appellants** (*Defendants*)

v.

Mari Ammal .. *Respondent* (*Plaintiff*).

Velayudha Maistry v. Mari Ammal.

Licence—Trees planted by licensee—Right to remove on termination of licence.

Trees planted under a licence do not go with the land and the person who planted the trees is entitled to cut and remove them; but he should restore the land in the condition in which it was before the trees were planted.

The principle applicable to removal of buildings on another man's land would also apply to trees.

Vasudevan Nambudripad v. *Valia Chathu Achan*, (1900) 10 M.L.J. 321: I.L.R. 24 Mad. 47 (F.B.), referred to.

Appeal against the decree of the District Court of East Tanjore at Negapatam dated 11th July, 1939, and made in A. S. No. 25 of 1938 preferred against the decree of the Court of the District Munsif of Negapatam in O. S. No. 39 of 1936.

K. S. Desikan for Appellants.

V. Ramaswami Aiyar for Respondent.

The Court delivered the following

JUDGMENT.—This is an appeal from the decree of the District Judge of East Tanjore dated 11th July, 1939, modifying in appeal the decree of the District Munsif of Negapatam dated 12th November, 1937, in O. S. No. 39 of 1936. The suit was one instituted for a declaration of the plaintiff's title to a narrow strip of land in the Negapatam Municipality abutting on a tank belonging to the community of the defendant, that is, the washermen of the locality. The land in question is a narrow strip of about 15 feet abutting on the plaintiff's garden which she purchased in December, 1935. This strip was claimed by the plaintiff as part of her garden and included in S. No. 1499. The defendants on the other hand alleged that the strip of land constituted the bund of the tank and belonged to them along with the tank and was included in S. No. 1500.

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* S. A. No. 514 of 1939. 23rd September, 1940.

Velayudha Maistry v. Mari Ammal.

The plaintiff's claim to this strip was negatived by the first Court and also by the lower appellate Court but in the appeal which was preferred by the plaintiff the lower appellate Court while dismissing the suit for a declaration of the plaintiff's title to the strip in question granted as an equitable remedy, permission to the plaintiff to cut and remove the trees in the strip of land before a certain date. The defendants appeal so far as the equitable remedy granted by the lower appellate Court is concerned.

So far as the facts are concerned, there can be no doubt that the finding of the lower appellate Court cannot be questioned in second appeal and as a matter of fact though an attempt was made to question the propriety of the findings of fact by the lower appellate Court in the course of the hearing of this appeal on the ground that there was no evidence to support them, no such attack appears to have been made or intended in the grounds of second appeal. It is in my opinion not open to the appellants to question the finding of the lower appellate Court to the effect that the trees in the strip were planted by the plaintiff's predecessors in title and not by the present appellants, that is, the defendants, and further that the planting was under an implied licence from the washermen. The First Court also observes that according to the Commissioner there is no fence separating the strip in dispute from the adjoining garden which belongs to the plaintiff and that the trees in the strip are more or less of the same age and description as the trees in the plaintiff's garden. The first Court was also of opinion that these circumstances would have afforded some corroborative evidence of the plaintiff's title and possession of the disputed site. In these circumstances it is impossible to contend that the finding of the lower appellate Court in favour of the plaintiff so far as the planting of the trees is concerned is not supported by any evidence in the case. On the finding of fact that the trees were planted by the plaintiff's predecessors in title and under an implied licence it seems to me that no real objection can be made to the modification made by the lower Court in favour of the plaintiff allowing her to cut and remove the trees before a certain date.

Several decisions have been brought to my notice by the Advocate for the respondents which show that the rule of English law that whatever is built upon land or grown upon

land grows with the land does not apply strictly to India. It is enough in this connection to refer to the older decisions. (In the matter of the petition of *Thakoor Chunder Paramanick*[1] and *Narayan Raghoji* v. *Bholagir Guru Mangir*[2]). In the latter case Couch, C.J., observed that the doctrine of the English law as to buildings, namely, that they should belong to the owner of the land cannot be applied to cases arising in India and that the only doctrine that could be applied is the doctrine established in India that the party so building on another's land, should be allowed to remove the materials. In the former case Sir Barnes Peacock, C.J., after referring to the Hindu Law and the Muhammadan Law relating to the topic observed as follows:

"We think it clear that, according to the usages and customs of the country, buildings and other such improvements made on land do not by the mere accident of their attachment to the soil become the property of the owner of the soil; and we think it should be laid down as a general rule that, if he who makes the improvement is not a mere trespasser, but is in possession under any *bona fide* title or claim of title, he is entitled either to remove the materials, restoring the land to the state in which it was before the improvement was made, or to obtain compensation for the value of the building if it is allowed to remain for the benefit of the owner of the soil, the option of taking the building, or allowing the removal of the material remaining with the owner of the land in those cases in which the building is not taken down by the builder during the continuance of any estate he may possess."

It was argued that the position would be different in the case of trees because trees exhaust the soil and benefit is derived from the soil by the person planting the trees for which no return is made to the owner of the land. This contention appears however to have been negatived in *Vasudevan Nambudripad* v. *Valia Chathu Achan*[3]. The Full Bench observed in that case as follows:

"We do not think that any valid distinction in principle can be drawn between buildings erected by a tenant and trees planted by him, and it will be observed that the Transfer of Property Act places both in the same category as regards the tenant's right of removal. It is suggested that trees exhaust the ground, but we are not aware that there is any proof of this. Many soils would probably benefit by being opened up and aerated by the planting of trees. There might be more difficulty in restoring ground planted with trees to its original state than in restoring ground covered with buildings, but that is a matter for the tenant to deal with when he removes the trees. If he does it, as the law requires him to do, the landlord will not be injured,

1. (1866) Beng. L.R. (Supp. Vol.) 595.
2. (1869) 6 Bom. H.C.R. (A.C.J.) 80.
3. (1900) 10 M.L.J. 321: I.L.R. 24 Mad. 47 (F.B.).

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and it is difficult to see on what principle the tenant's right to remove the trees could be forbidden."

In this particular case the plaintiff has indeed an indisputable right to the removal of the trees because of the findings that the planting must have been done by her predecessors in title under an implied licence from the defendant's community. It would be certainly inequitable to hold in such circumstances that the trees planted under a licence nevertheless go with the land and the person who planted the trees is not to be allowed to remove them and restore the land in the condition in which it was before the trees were planted. The decree of the lower appellate Court will be modified so as to make it clear that the plaintiff after she removes the trees should restore the land to the condition in which it was before the trees were planted.

With this modification the second appeal is dismissed with costs.

Leave to appeal is refused.

As the cutting of the trees was prohibited by an order made during the pendency of this second appeal the time for the removal is extended to three months from this date.

K. S. *Appeal dismissed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, MR. JUSTICE GENTLE AND MR. JUSTICE KRISHNASWAMI AIYANGAR.

A.S. Nagappa Chettiar and another .. *Appellants** (*Petitioners*)

v.

Annapoorani Achi *alias* Karuppayi Achi and another. *Respondents* (*Respondents*).

F.B. — Nagappa Chettiar v. Annapoorani Achi.

Madras Agriculturists' Relief Act (IV of 1938). S. 28—Rules framed under S. 28—Provision for right of appeal—Ultra vires *the Government—Proceedings under S. 19—Whether proceedings in execution appealable under Civil Procedure Code, S. 47.*

An appeal does not lie as of right but must be conferred by express enactment. R. 8 made under S. 28 of the Madras Agriculturists' Relief Act providing for appeals is *ultra vires*. Proceedings under S. 19 of the Act to scale down decrees are not proceedings in execution and no appeal will lie under S. 47 Civil Procedure Code.

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* A.A.O. No. 301 of 1939. 5th December, 1940.

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Appeal against the order of the Court of the Subordinate Judge of Devakottai dated 5th August, 1939 and passed in I.A. No. 154 of 1939 in O.S. No. 22 of 1939.

K. Rajah Aiyar and *V. Seshadri* for Appellants.

R. Kesava Aiyangar for Respondents.

This appeal coming on for hearing before the Court (*Wadsworth and Patanjali Sastri, JJ.*), on 4th November, 1940, the Court made the following

ORDER OF REFERENCE TO THE FULL BENCH.

This appeal is preferred against the dismissal of an application under S. 19 of Madras Act IV of 1938 and a preliminary objection has been taken that no appeal lies. The order under appeal was passed on 5th August, 1939. On this date there was no right of appeal against the order, unless it could be said to be one falling under S. 47, Civil Procedure Code. The appellant therefore filed a Civil Revision Petition against the order. On 27th October, 1939, a notification was issued in the *Fort Saint George Gazette* under S. 28 of the Act promulgating a new r. 8, which prescribes that:

"Appeals shall lie from any of the following orders passed by a Court under the Act, namely . . . . . . (*b*) an order under S. 19 amending or refusing to amend a decree or entering or refusing to enter satisfaction in respect of a decree; . . . . as if the order related to the execution, discharge or satisfaction of the decree within the meaning of S. 47 of the Code of Civil Procedure, 1908."

After the publication of this rule, the appellant on 2nd November, 1939, filed the present appeal and his pending Civil Revision Petition was withdrawn and dismissed. It is contended for the respondent that the new r. 8 is not retrospective (vide *Chidambaram Chettiar* v. *Muthukumaraswami Chettiar*[1]), that the order when passed was final, and that the subsequent creation of a right of appeal cannot take away the vested right of the respondent in that final order. Alternatively it is contended that the new rule is *ultra vires*, as it purports to create a new remedy and goes beyond the power given in S. 28 (*c*) to make rules. 'for removing any difficulty in giving effect to the provisions of this Act.'

The appellant contends that the right of appeal under the rule enures to the benefit of any party aggrieved by an order, an appeal against which was not barred by limitation on the date of the promulgation of the rule. He also contends that the new r. 8 is *intra vires* and that it should be read not so much as creating a new right of appeal, as declaring the nature of the specified orders to be such as to fall within S. 47, Civil Procedure Code, so as

1. (1940) 1 M.L.J. 317.

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automatically to attract to them the right of appeal given under the ordinary law. It is also suggested that if it be held that there is no right of appeal under the rules, it will be necessary to resolve the conflict between two bench decisions (*Jami Venkatapadu* v. *Kannepalli Ramamurthi*[1] and *Pakkiri Muhammad Tharaganar* v. *U. T. Syed Sahib*[2]) and to decide whether or not the order is appealable apart from the rules.

We are of opinion that these contentions raise questions of such importance that it is desirable to refer them to a Full Bench. That being so, we do not wish to express any opinion on the merits of those contentions. The respondent has quoted the decision of the Privy Council *The Colonial Sugar Refining Company, Ltd.* v. *Irving*[3] and also the Full Bench decisions in *Daivanayaka Reddiar* v. *Renukambal*[4] and *Vasudeva Samiar, In re*[5] in support of his main contention. The appellant has referred us to a passage at p. 199 of Maxwell's Interpretation of Statutes (8th edition) which is based on the case of *The 'Alexander.'*[6]

We refer the following questions to a Full Bench:

(1) When a statutory rule giving a right of appeal is promulgated after a final order has been passed, will an appeal lie under that rule against that order?

(2) Is r. 8 of the rules framed under Madras Act IV of 1938 *ultra vires*? If so,

(3) Is the decision in *Pakkiri Muhammad Tharaganar* v. *U. T. Syed Sahib*,[2] right in holding that an order under S. 19 of Madras Act IV of 1938 is not appealable as falling under S. 47, Civil Procedure Code?

The above reference came on before the Full Bench (*The Chief Justice, Gentle and Krishnaswami Aiyangar, JJ.*)

The Full Bench expressed the following

OPINION.—Three questions arising out of the Madras Agriculturists' Relief Act (IV of 1938) have been referred for decision by a Full Bench and this Bench has been constituted for the purpose. The questions read as follows:

"(1) When a statutory rule giving a right of appeal is promulgated after a final order has been passed, will an appeal lie under that rule against that order?

(2) Is r. 8 of the rules framed under Madras Act IV of 1938 *ultra vires*? If so,

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1. (1939) 2 M.L.J. 853.
2. (1940) 1 M.L.J. 422.
3. (1905) A.C. 369.
4. (1927) 53 M.L.J. 637: I.L.R. 50 Mad. 857 (F.B.).
5. (1928) 56 M.L.J. 369: I.L.R. 52 Mad. 361 (F.B.).
6. (1841) 166 E.R. 580.

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(3) Is the decision in *Pakkiri Muhammad Tharaganar* v. *U. T. Syed Sahib*[1], right in holding that an order under S. 19 of the Madras Act IV of 1938 is not appealable as falling under S. 47 of the Civil Procedure Code?"

It will be convenient to take the second question first, because if it is answered in the affirmative the first question will not call for an answer.

The Act itself does not directly provide for an appeal against an order passed in exercise of jurisdiction conferred by the Act, but the Provincial Government has assumed that S. 28, which confers upon it power to make rules under the Act, is sufficiently widely drawn to enable it to provide for appeals. S. 28 reads as follows:

" (1) The Provincial Government may make rules for carrying into effect the purposes of this Act.

(2) In particular and without prejudice to the generality of the foregoing power, the Provincial Government may make rules—

(a) in regard to any matter which is required to be prescribed by this Act;

(b) prescribing the form of, and the fees to be paid in respect of, applications under this Act; and

(c) for removing any difficulty in giving effect to the provisions of this Act.

(3) All the rules made under this section shall be consistent with the provisions of this Act. They shall be published in the Official Gazette and upon such publication shall have effect as if enacted in this Act."

Relying on sub-S. (1) and cl. (c) of sub-S. (2) of S. 28 the Provincial Government, by a notification dated the 27th October, 1939, added the following rule to those already framed:

"(8) Appeals shall lie from any of the following orders passed by a Court under the Act, namely:—

(a) an order under S. 18 (1) amending or refusing to amend a decree;

(b) an order under S. 19 amending or refusing to amend a decree or entering or refusing to enter satisfaction in respect of a decree;

(c) an order under S. 20 staying or refusing to stay proceedings in execution of a decree;

(d) an order under S. 22 directing or refusing to direct the refund of any sum realised in execution of a decree;

(e) an order under S. 23 setting aside or refusing to set aside any sale or foreclosure of immovable property; and

(f) an order under S. 24 directing or refusing to direct the repayment of any purchase money realized in execution of a decree;

as if the order related to the execution, discharge or satisfaction of the decree within the meaning of S. 47 of the Code of Civil Procedure, 1908."

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1. (1940) 1 M.L.J. 422.

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Before discussing the nature of the provisions to be found in sub-S. (1) and cl. (c) of sub-S. (2) of S. 28 it will be advantageous to refer to certain of the cases in which the governing principle that an appeal does not lie as of right, but must be conferred by express enactment, has been applied. The first of the cases which I have in mind is that of the *Attorney-General* v. *Sillem*[1]. By S. 26 of the Queen's Remembrancer's Act, 1859, the Barons of the Court of Exchequer were given authority to make rules with regard to the process, practice, and mode of pleading in revenue cases in their Court. By virtue of this section the Barons of the Exchequer made rules in which they purported to grant an appeal to the Exchequer Chamber and to the House of Lords. It was held by the House of Lords that the section did not authorize them to do this. Lord Westbury, L.C., in the course of his judgment in that case said:

"The creation of a new right of appeal is plainly an act which requires legislative authority. The Court from which the appeal is given, and the Court to which it is given, must both be bound, and that must be the act of some higher power .... In making the orders now in question, the Barons of the Court of Exchequer have assumed that a discretionary power to exercise this legislative authority or not, and thereby to confer or to withhold, this important benefit of new rights of appeal, has been given to them by the 26th section of the Act of 1859. If the Legislature has done this, it has done a thing which is very irregular, and which antecedently would seem to be very improbable.

It is not reasonable to suppose that in matters affecting the taxation of the subject, the Legislature would abdicate its own functions and delegate to the Barons of the Exchequer the power of determining at their pleasure whether, in certain cases, there should or should not be a right of appeal as between the subject and the Crown."

In *Cousins* v. *Lombard Deposit Bank*[2], the question was whether the Court of Appeal from Inferior Courts was empowered by S. 6 of the County Courts Act, 1875, to hear an appeal from a decision of a County Court upon a question of fact arising in a suit brought within its jurisdiction as a Court of common law. Grove, J., observed that if the Legislature had intended to allow an appeal on such a question clear language would have been employed. In *Sandbank Charity Trustees* v. *North Staffordshire Railway Co.*,[3] Bramwell, L.J., in considering the question whether the Court had jurisdiction over the Master's taxation on a motion to review, answered it

1. (1864) 10 H.L.C. 704: 11 E.R. 1200.
2. (1876) 1 Ex. Dn. 404.
3. (1877) 3 Q.B.D. 1.

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in the negative. He said that an appeal did not exist in the nature of things and a right to appeal from any decision of any tribunal must be given by express enactment. The Privy Council has also considered this question. In *Minakshi Naidu* v. *Subramanya Sastri*[1], the Judicial Committee was called upon to say whether the High Court had jurisdiction to hear an appeal from an order of a District Judge made by him in a proceeding under the Religious Endowments Act, 1863, appointing a member to fill a vacancy in a committee. The Act gave no right of appeal. It was held that neither the Act, nor the general law, gave any right of appeal. In the course of the judgment it was observed:

"In approaching the consideration of this question, their Lordships cannot assume that there is a right of appeal in every matter which comes under the consideration of a Judge; such a right must be given by Statute, or by some authority equivalent to a statute."

In *Rangoon Botatoung Co., Ltd.,* v. *The Collector, Rangoon*[2], the Privy Council dealt with the question whether there was an appeal to His Majesty in Council from a decision of the Chief Court of Lower Burma on a reference to that Court by the Collector of Rangoon in proceedings under the Land Acquisition Act. It was held that there was no such right. Delivering the judgment of the Board, Lord Macnaghten referred to the observations of Bramwell, L.J., in *Sandbank Charity Trustees* v. *The North Staffordshire Railway Co.,*[3] and said that the right of appeal could not be implied.

In view of these observations it is manifest that what we have to consider is whether there is anything in S. 28 of the Madras Agriculturists' Relief Act, which can reasonably be read as conferring authority on the Provincial Government to make rules providing for appeals from orders passed under the Act. Only sub-S. (1) and Cl. (*c*) of sub-S. (2) are relied upon in support of the contention that r. 8 is *intra vires* the powers of the Provincial Government. Sub-S. (1) merely says that the Provincial Government may make rules for carrying into effect the purpose of this Act. In making a rule providing for appeals the Provincial Government is not making a rule for carrying into effect the purposes of the Act. It is adding

1. (1887) L.R. 14 I.A. 160: I.L.R. 11 Mad. 26 (P.C.).
2. (1912) 23 M.L.J. 276: L.R. 39 I.A. 197: I.L.R. 40 Cal. 21 (P.C.).
3. (1877) 3 Q.B.D. 1.

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something to the Act. The object of the Act is to grant relief to agriculturists by providing machinery for the scaling down of their debts. The Court of first instance decides whether a case falls within or without the Act. If a case falls within the Act the Court must scale down the debt in accordance with the directions embodied in the Act. An order of the Court must be taken to be a correct order unless it is shown to be wrong by an appellate tribunal which has power to entertain an appeal. Cl. (*c*) of sub-S. (*2*) does not carry the matter any further. By providing for an appeal the Provincial Government is not removing any difficulty in giving effect to the provisions of the Act. The Courts of first instance are there for the purpose and, as I indicated, their orders must be assumed to be correct. To read either into sub-S. (1) or into Cl. (*c*) of sub-S. (2) a power for the Provincial Government to constitute an appellate tribunal would be to read something which is not there, and incidentally be ignoring a well settled principle. Therefore, the answer I would give to the second question is that r. 8 is *ultra vires* the power of the Provincial Government. As my learned brothers agree, in this answer it is not necessary to discuss the first question.

The third question has arisen as the result of a conflict in the decisions of this Court. In *In re Subbarayudu*[1], Burn and Stodart, JJ., held that an order passed on an application filed under S. 19 of the Madras Agriculturists' Relief Act while no proceedings in execution are pending is not appealable. In the opinion of the learned Judges it could not be considered to be a question under S. 47 of the Code of Civil Procedure in the absence of execution proceedings. S. 19 provides that where before the commencement of the Act, a Court has passed a decree for the repayment of a debt, it shall, on the application of a judgment-debtor who is an agriculturist or in respect of a Hindu joint family debt, on the application of any member of the family, whether or not he is the judgment-debtor, or on the application of the decree-holder, apply the provisions of the Act to the decree and shall, notwithstanding anything contained in the Code of Civil Procedure, 1908, amend the decree or enter satisfaction as the case may be in *Jami Venkatapadu* v. *Kannepalli Ramamurthi*[2], Pandrang

1. (1939) 2 M L.J. 609.

2. (1939) 2 M.L.J. 853.

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Row and Abdur Rahman, JJ. without giving any reasons, stated that they had no doubt that petitions filed under S. 19 must be deemed to be petitions which raise questions relating to execution, discharge or satisfaction of a decree and therefore come within the matters covered by S. 47 of the Code of Civil Procedure. In *Pakkiri Muhammad Tharaganar* v. *Syed Sahib*[1], Burn and Lakshmana Rao, JJ. had to consider the effect of the decision in *In re Subbarayudu*[2] the argument being that if at the time when an order is made under S. 19 of the Madras Agriculturists' Relief Act there is pending an execution petition, the order would be appealable as one falling under S. 47 of the Code of Civil Procedure. The learned Judges directly negatived this contention. They held that the pendency of execution proceedings did not make an application under S. 19 of the Madras Agriculturists' Relief Act a matter relating to the execution of the decree in any sense. The learned Judges regarded the observations of Pandrang Row and Abdur Rahman, JJ. in *Jami Venkatappadu* v. *Kannepalli Ramamurthi*[3] as being merely an *obiter dictum* which it was.

I have no hesitation in preferring the view expressed in *Pakkiri Muhammad Tharaganar* v. *Syed Sahib*[1] on this question to that expressed in *Jami Venkatapadu* v. *Kannepalli Ramamurthi*[3]. When dealing with applications under S. 19 of the Madras Agriculturists' Relief Act the Court is not acting in execution. Its function is to apply the provisions of the Act to decrees against persons who are entitled to relief under the Act. If relief is applied for and the Court considers that the applicant is entitled to have the provisions of the Act applied the Court must apply them. If the scaling down does not wipe out the decretal amount then an amended decree is passed, which can only be enforced in execution proceedings separately instituted under the Code of Civil Procedure. If the scaling down wipes out the decretal amount the Court cannot pass an amended decree. It must then declare that the decree has been satisfied. But here again, the entering up of satisfaction is not in execution proceedings, but in proceedings, under the Agriculturists' Relief Act, which are of an independent nature. Unless proceedings under S. 19 can be regarded as proceedings in execution —and I think I have said sufficient to indicate that in my opinion

1. (1940) 1 M.L.J. 422. 2. (1939) 2 M.L.J. 609.
3. (1939) 2 M.L.J. 853.

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they are not—S. 47 of the Code of Civil Procedure can have no application. It follows that in my judgment the answer to the third question is that the decision in *Pakkiri Muhammad Tharaganar* v. *Syed Sahib*[1] in holding that an order under S. 19 of the Madras Agriculturists' Relief Act is not appealable under S. 47 of the Code of Civil Procedure is right. In giving this answer I do not intend, however, to express any opinion on the statement to be found at the end of the judgment in that case to the effect that if the decree is scaled down, an appeal will lie from the new decree. This statement was no doubt made on the opinion of this Court previously expressed that an appeal will lie from an order amending a decree. That question is not before us and therefore in holding that *Pakkiri Muhammad Tharaganar* v. *Syed Sahib*[1] was rightly decided the answer is confined merely to the applicability of S. 47 of the Code of Civil Procedure. I may also add that in answering the third question the Court is only concerned with cases falling within S. 19 of the Madras Agriculturists' Relief Act and not with applications under S. 20. The consideration of the position with regard to S. 20 must be left until the question arises.

I would make the costs of this reference costs in the cause.

K. S. *Reference answered.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

K. L. K. Rm. Ramanathan Chettiar, a firm of Bankers carrying on business at Palladam .. *Appellant** (*Petitioner 8th Defendant*)

v.

Seetharama Aiyar .. *Respondent* (*Respondent Plaintiff*).

Ramanathan Chettiar v. Seetharama Aiyar.

Madras Agriculturists' Relief Act (*IV of* 1938), *S*. 3—*Firm of money-lenders—If an "Agriculturist"*.

It is clear with reference to the definitions in S. 3 of Madras Act IV of 1938 that a firm of money-lenders cannot be an agriculturist.

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1. (1940) 1 M.L.J. 422.

* A. A. O. No. 134 of 1940. 5th November, 1940.

Appeal against the order of the Court of the Subordinate Judge of Coimbatore dated 4th March, 1940, and made in I.A. No. 973 of 1939 in O. S. No. 36 of 1936. Rama-nathan Chettiar v. Seetha-rama Aiyar.

V. T. Rangaswami Aiyangar and *K. S. Sankararaman* for Appellant.

A. K. Sreeraman for Respondent.

The Court delivered the following

JUDGMENT.—It seems to us clear with reference to the definitions in S. 3 of Madras Act IV of 1938 that a firm of money-lenders cannot be an agriculturist. If the application be treated as one by the individual member of the firm it must fail, for the individual member has been assessed to income-tax during the period specified in proviso *C* to S. 3 (3), so that he cannot claim to be an agriculturist.

The appeal is therefore dismissed with costs.

K. S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

Alampalli Athmaramayya .. *Petitioner** (*Petitioner—Plaintiff*)

v.

S. Seshappaiyer .. *Respondent* (*Respondent —Defendant*).

Limitation Act (IX of 1908), S. 19—Acknowledgment of debt contained in postcards—Oral evidence to explain to what debts the postcards refer—Admissibility. Athma-ramayya v. Seshappa Aiyar.

To save limitation two postcards were relied on as acknowledging a debt. On the face of the postcards it could not be said that they necessarily referred to the suit debt.

Held, that there was nothing in S. 19 of the Limitation Act or in the Evidence Act which precluded the letting in of oral evidence to explain to what debts the postcards necessarily referred.

Petition under S. 25 of Act IX of 1887 praying that the High Court will be pleased to revise the order of the Court of the District Munsif of Kollegal dated 20th December, 1937 and passed in Court Fee No. 5246 of 1937.

K. S. Champakesa Aiyangar and *K. C. Srinivasan* for Petitioner.

Respondent not represented.

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* C. R. P. No. 703 of 1938. 22nd November, 1940.

Athmaramayya v. Seshappa Aiyar.

The Court delivered the following :

JUDGMENT.—The petitioner filed a suit on a promissory note dated the 17th July, 1933 and on that promissory note were acknowledgments up to the 26th February, 1934. The plaint was filed on the 1st December, 1937, which was more than three years after the last acknowledgment endorsed on the promissory note. To save limitation, the petitioner relied on two postcards dated the 14th January, 1935 and the 25th March, 1935. The District Munsif of Kollegal, in whose Court the plaint was presented, rejected the plaint on the ground that the postcards of the 14th January, 1935 and the 25th March, 1935 did not acknowledge this particular debt.

It is true that on the face of these two postcards it cannot be said that they necessarily refer to the suit debt; but the plaintiff's only contention here is that the plaint should not have been rejected *in limine*; and that he should have been given an opportunity after the plaint was admitted to prove by evidence that these postcards related to the suit debt. I do not find anything in S. 19 of the Limitation Act or in the Evidence Act which precludes the letting in of oral evidence to explain to what debts the postcards necessarily refer.

The petition is therefore allowed and the District Munsif ordered to admit the plaint and to dispose of the suit in accordance with law. The costs of this petition will be costs in the cause.

K. S. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PANDRANG RAO.

Ganthakoru Mangamma and others. *Appellants** (*Plaintiff and Defendants 14 to 16*).

v.

Dulla Paidayya and others .. *Respondents* (*Defendants 1 to 13*).

Mangamma v. Paidayya.

Civil Procedure Code (V of 1908), S. 100—Second appeal—Practice—Judgment of lower appellate court not dealing with reasoning of lower court as to credibility of witnesses—If ground for second appeal.

Where the lower appellate Court deals with the entire evidence in the case in a few sentences, and without any advertence to the documentary evidence on the side of the plaintiff and gives no reason for rejecting the

*S. A. No. 1010 of 1937. 24th September, 1940.

conclusions of the trial Judge as regards the credibility of the witnesses examined on the side of the plaintiff, such a judgment does not satisfy the requirements of law and must be deemed to be a judgment vitiated by an error in procedure. As a matter of law the lower appellate Court is bound not to go against the opinion of the trial Judge who had an opportunity of having the witnesses before him, in deciding upon the credibility of the oral evidence in the case. A second appeal is competent in the circumstances.

Appeal against the decree of the Court of the Subordinate Judge of Chicacole in A. S. No. 233 of 1936 (A. S. No. 221 of 1934 Sub-Court, Vizagapatam, A. S. No. 31 of 1933 District Court, Vizagapatam) preferred against the decree of the Court of the District Munsif of Vizagapatam in O. S. No. 175 of 1932.

Kasturi Seshagiri Rao for Appellants.

G. Suryanarayana for Respondents.

The Court delivered the following

JUDGMENT.—This is an appeal from the decree of the Subordinate Judge of Chicacole dated the 19th November 1936 reversing on appeal the decree of the District Munsif of Vizagapatam dated the 10th November, 1932 in O. S. No. 175 of 1932. The reversal was based on a single ground namely, that the plaintiff had failed to show that she or her vendors had possession of the suit property at any time within 12 years prior to the suit and that therefore the suit was barred by limitation. The other points which arose in the case and which had been decided in favour of the plaintiff were not considered by the lower appellate Court and indeed the main complaint by the appellant has been that the judgment of the lower appellate Court does not satisfy the legal requirements of a judgment.

This is a case in which by a curious irony, the Subordinate Judge who decided the case was an officer junior in rank to the District Munsif who decided the case as the trial Judge. This is accounted for by the fact that nearly four years elapsed between the decision by the trial Judge and the decision in appeal.

The question of possession was dealt with by the trial Court in a careful judgment covering a lot of ground and no attempt was made by the lower appellate Court to come to close quarters with the evidence in the case or to meet the reasoning of the trial Court in support of its conclusion. In other words, this is a case to which the observations of their Lord-

Mangamma v. Paidayya.

ships of the Judicial Committee in *Rani Hemantha Kumari Debi* v. *Maharaja Jagindra Nath Roy Bahadur*[1] would apply, namely, that the judgment in appeal does not come to close quarters with the judgment which it reviews and indeed never discusses or alludes to the reasoning of the trial Judge. In such a case their Lordships observed that this characteristic of the appellate Court's judgment "seriously invalidates its authority". The entire evidence is dealt with very unsatisfactorily by the lower appellate Court in a few sentences and no reference is made to the documentary evidence on the side of the plaintiff and no reason is given for rejecting the conclusion of the trial Judge as regards the credibility of the witnesses examined on the side of the plaintiff. On the other hand, the documentary evidence on the side of the defendants was accepted without question by the lower appellate Court in spite of the several reasons given by the trial Judge for rejecting the documentary evidence. On the whole, I have no doubt that this is a case in which the judgment of the lower appellate Court does not satisfy the requirements of the law and must therefore be deemed to be a judgment vitiated by an error in procedure.

Even otherwise there has been a failure to give sufficiently good reasons for upsetting the findings of the trial Judge as regards the credibility of the oral evidence in the case. As a matter of law, the lower appellate Court was bound not to go against the opinion of the trial Judge who had an opportunity of having the witnesses before him in deciding upon the credibility of the oral evidence in the case. Unless good reasons are given, any interference with the conclusion of the trial Judge on matters of this kind must be deemed erroneous in law. These considerations are sufficient to meet the contention on the side of the respondents that the second appeal is not competent as it does not fall within any of the grounds mentioned in S. 100 of the Code of Civil Procedure. This is a case in which the second appeal does come within one of the grounds mentioned in that section and the objection as to the competence of the appeal is not well founded.

In these circumstances, the only course to be adopted is to reverse the finding on the question of possession and the decree of the lower appellate Court and to remand the appeal for fresh

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1. (1906) 16 M.L.J. 272 at 274.

disposal according to law after considering all the evidence in the case. The costs of this second appeal will abide and follow the result and should be provided for in the revised decree of the lower Court. The court-fee paid on the memorandum of appeal will be refunded to the appellants. Mangamma v. Paldayya

Leave to appeal is asked for but I see no sufficient reason to grant leave.

K. S. *Appeal remanded.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

Rama Pattar's son Parameswara Aiyar .. *Petitioner** (*Petitioner*)

v.

Kootallor Manakkal Moopil Stanom Bhramadathan Nambudripad Manager Narayanan Nambudripad's son Narayanan Nambudripad. *Respondent* (*Respondent*).

Madras Agriculturists' Relief Act (IV of 1938), S. 15 (1)—Assignment by non-agriculturist to agriculturist after coming into force of the Act—Rent due by such assignee—If falls under S. 15 (1). Parameswara Aiyar v. Narayanan Nambudripad.

Where at the commencement of the Madras Agriculturists' Relief Act rent was payable by a non-agriculturist in respect of a certain land the mere fact that such land had been assigned after the Act came into force to an agriculturist cannot give the latter the benefit of S. 15.

Petition under S. 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the Court of the District Munsif of Alatur dated 3rd April, 1939 and made in O. P. No. 180 of 1938.

K. P. Ramakrishna Aiyar for Petitioner.

D. H. Nambudripad for Respondent.

The Judgment of the Court was delivered by

Wadsworth, J.—This petition arises out of the dismissal of an application under S. 15 (4) of the Madras Act IV of 1938. The petitioner, who is an agriculturist, obtained an assignment of the land on which the rent was due on 1st June, 1938, that is to say, after the Act came into force. On the date of the commencement of the Act the tenant was his Wadsworth, J.

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*C.R.P. No. 2563 of 1939. 22nd October, 1940.

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assignor. The latter is admittedly not an agriculturist. The petitioner claims the benefits of S. 15 of the Act on the ground that he is an agriculturist and has deposited into Court the arrears due for faslis 1346 and 1347. We are of opinion that this petition cannot succeed. We have already expressed the view in C. R. P. No. 1632 of 1938 *Amad Koya* v. *Appu*,[1] that S. 15 (1) requires that there should be rent outstanding on the date of the commencement of the Act, which rent must be, as on that date, payable by an agriculturist. In that case we were dealing with a slightly different contention from that now urged, but the essential question was: What is the date with reference to which rent must be payable by an agriculturist to a landholder in order to satisfy the conditions of S. 15 (1) of the Act? Clearly in the present case, at the commencement of the Act there was no rent payable by an agriculturist in respect of this land, and the mere fact that the land has been assigned after the Act came into force to an agriculturist, cannot give the latter the benefit of S. 15. The Civil Revision Petition is therefore dismissed with costs.

K. S. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATARAMANA RAO.

P. N. Krishna Pattar .. *Appellant* (4th Defendant)*

v.

Kannambra Nayar Veettil Valia Amma Kutti Neithiar's son Kunhunni Elaya Nayar and others .. *Respondents (Plaintiff and Defendants 1 and 2).*

Krishna Pattar v. Kunhunni Elaya Nayar.

Pledge—Deposit of share certificates of company—If creates a valid pledge of such shares.

As the law stands at present in India, a mere deposit of share certificates would not be enough to create a valid pledge. In order to constitute a valid pledge there should be such delivery of possession to the pledge by virtue of which he can effectively exercise the power of sale for realising the debt.

Appeal against the decree of the Court of the Subordinate Judge of South Malabar at Palghat in A. S. No. 13 of

1. (1940) 2 M.L.J. 935.

* Second Appeal No. 526 of 1937. 25th October, 1940.

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1936 (A. S. No. 403 of 1935, District Court, Calicut) preferred against the decree of the Court of the District Munsif of Palghat in O. S. No. 111 of 1935.

C. S. Swaminathan for Appellant.

K. Kuttikrishna Menon for Respondents.

The Court delivered the following

JUDGMENT.—This second appeal raises a question of some difficulty and importance. The question is whether there can be a valid pledge of the shares of a company registered under the Indian Companies Act by the mere deposit of shares as a security for a debt. The question has arisen in this case thus. One Subramania Pattar was indebted to Ramakrishna Pattar on a promissory note dated 22nd March, 1931. This note was subsequently endorsed to the plaintiff. The case of the plaintiff is that when he demanded the amount due under the note, Subramania Pattar deposited the shares which he held in Parali Tile Works Ltd., as and by way of pledge. He therefore filed this suit for recovery of the debt by sale of the said shares. The main contesting defendant in the case is the fourth defendant who purchased the shares in Court auction in execution of a decree in S. C. No. 13 of 1934 on the file of the Palghat Sub-Court obtained by the third defendant against the said Subramania Pattar. He denies the validity of the pledge. The District Munsif was of opinion that the pledge was not valid because there was no transfer of shares in favour of the plaintiff. He therefore declined to give the plaintiff any relief on the footing of the pledge. The learned Subordinate Judge held that there was a valid pledge. The question now is whether this view is sound.

S. 172 of the Indian Contract Act defines a pledge as the bailment of goods as security for the payment of a debt or performance of an obligation. "Bailment" is defined by S. 148 of the Act thus;

> "A 'bailment' is the delivery of goods by one person to another for some purpose, upon a contract that they shall, when the purpose is accomplished, be returned or otherwise disposed of according to the directions of the person delivering them."

Thus a valid pledge connotes two essential elements: (*i*) delivery of goods and (*ii*) security for a debt or performance of an obligation. There is no definition of "goods" in the chapter relating to bailment nor in the Contract Act as amend-

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ed. Before the amendment of the Act S. 76 of the Act defined "goods" thus:

"In this chapter 'goods' means and includes every kind of moveable property."

But the definition was only for the purpose of the chapter relating to sale of goods. S. 76 has been repealed and is replaced by S. 2 (7) of the Act which runs thus:

" 'Goods' means every kind of moveable property other than actionable claims and money; and includes stock and shares . . . . . ."

Neither the definition of "goods" in S. 76 of the Contract Act nor the definition in the Sale of Goods Act can be availed of for interpreting "goods" in S. 172 of the Contract Act. There is a difference of opinion as to whether stocks and shares would be "goods" within the meaning of the said section. In *Lalit Mohan Nandy* v. *Haridas Mukherjee*,[1] Sanderson, C.J., and Mukherjee, J., took the view that share certificates are not "goods" within the meaning of S. 178 of the Indian Contract Act. The Bombay High Court has taken the view that they are (vide *R. D. Sethna* v. *The National Bank of India*[2], and *Jamshedji* v. *Maganlal*.[3]) Taking the language of Ss. 172 and 178 of the Contract Act together it would seem that the term "goods" was intended to connote property which is capable of physical possession and transferable by manual delivery. This view derives support from the nature of a pledge. A pledge in law is neither a mortgage nor a lien and does not pass property in the goods but only passes what is described as "special" property for want of a better term (*vide* criticism of the use of the term by Rash Behari Ghose in his Book on Mortgages, Volume I—5th edition, p. 112). What is meant by the expression is that no title to the goods passes but the pledgee is allowed to retain the thing pledged till payment of the debt and in default of payment, to sell the thing pledged so as to pass the property to the vendee. This is ordinarily possible in the case of property which is capable of physical possession, but the statute in certain cases treated documents of title as equivalent to "goods". Lord Wright points out in the *Official Assignee of Madras* v. *Mercantile Bank of India*[4] that under the Common Law a pledge of a document is not a pledge of goods

1. (1916) 24 C.L.J. 335 (F.B.). 2. (1910) 12 Bom.L.R. 870.
3. (1925) 27 Bom.L.R. 514.
4. (1934) 68 M.L.J. 26: L.R. 61 I.A. 416: I.L.R. 58 Mad. 181.

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but that under the Factors Acts in England and India a pledge of certain mercantile documents was deemed to be a pledge of goods and the Indian Contract Act amended and consolidated the previously existing law and it shows that there can be a pledge of goods either by pledging the goods *eo nomine* or by pledging the relative documents. But what these documents are, are specified in S. 178 and why the statute treats a pledge of documents as a pledge of goods was thus explained by their Lordships of the Privy Council in *Ramadas Vithaldas* v. *Ameerchand & Co.*,[1] thus:

"In their Lordships' opinion the only possible conclusion is that when any doubt arises as to whether a particular document is a document showing title or 'a document of title' to goods for the purposes of the Indian Contract Act, the test is whether the document in question is used in the ordinary course of business as proof of the possession or control of goods, or authorising or purporting to authorise, either by endorsement or delivery the possessor of the document to transfer or receive the goods thereby represented."

It seems to me therefore that the view taken by the Calcutta High Court is sound. Shares in an incorporated company are what in England would be called choses in action, a known legal expression to describe all personal rights of property which can only be claimed or enforced by action and not by taking physical possession. They would be actionable claims within the meaning of S. 3 of the Transfer of Property Act, but by virtue of S. 137 of that Act are excluded from the purview of the chapter relating to actionable claims. They are moveable property under S. 28 of the Indian Companies Act for the purposes of transfer under that Act. Strictly speaking therefore share certificates would not be "goods" within the meaning of Ss. 172 and 178 of the Contract Act, but the Contract Act is not exhaustive. Under the Common Law stocks and shares can be the subject-matter of a pledge. Story in his Book on the Law of Bailments says as follows:

"And first, as to the things, which may be the subject of it. These are ordinarily goods and chattels; but money, debts, negotiable instruments, choses in action (coupon bonds payable to bearer, shares in the stock of an incorporated company) and indeed any other valuable things of a personal nature, such as patent rights and manuscripts may by the Common Law be delivered in pledge".

But whether the Bombay view is to be taken or whether the Common Law is to be followed, to constitute a valid pledge

1. (1916) 31 M.L.J. 541: L.R. 43 I.A. 164: I.L.R. 40 Bom. 630 at 634 (P.C.).

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there must be such delivery of possession of property intended to be pledged to the pledgee by virtue of which he can exercise the right of sale for realising the debt, a legal incident which attaches to every transaction of pledge. Dealing with the subject of delivery Story says thus:

> "What will amount to a delivery of the thing is, in many cases, matter of law. There need not be an actual manual delivery of the thing. It is sufficient, if there are any of those acts or circumstances which, in construction of law, are deemed sufficient to pass the possession of the property. Thus, goods at sea may be passed in pledge by a transfer of the muniments of title; as by a transfer of the bill of lading or by a written assignment thereof. So goods in a warehouse may be transferred by a symbolical delivery of the key thereof; (and a pledge of stock in an incorporated company may be created by a written transfer, by which the legal title passes to the creditor.)"

Therefore a deposit of a share certificate would not confer any interest or property in the shares pledged because if default in payment is committed and the pledgee chooses to enforce the right of sale, he would not be in a position to transfer the title in them to the vendee. In order to constitute a valid delivery the pledgee must be put in control of the thing pledged so that he may effectively exercise the power of sale. In this connection I should like to refer to the decision in *Lala Jyoti Prakash Nandi* v. *Lala Mukti Prakash Nandi*[1], where it was held that a mere deposit of Government securities cannot constitute a valid pledge. During the course of the judgment the learned Judges observed as follows:—

> "It is difficult to apply the law relating to pawns as contained in the Contract Act to pledges of all classes of documents. Take the case of title deeds. What can the pawnee sell? There is no equitable mortgage even created by their delivery or deposit as collateral security outside presidency towns. They may be "goods" in the sense of being pieces of parchment or paper, but what value are they as such? Mere delivery of Government securities gives no property in them for purposes of negotiation or sale without endorsement."

But no special property can be vested in the pledgee by a mere indorsement of the share certificate as in the case of Government securities. An assignment is necessary. The assignment operates as a constructive delivery of the thing pledged. This principle is recognised in S. 178 of the Indian Contract Act where in the case of certain documents of title mentioned therein, a mere delivery of the documents could not be enough, particularly in the case of a bill of lading. As

1. (1916) 22 C.W.N. 297.

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pointed out by their Lordships of the Privy Council, an assignment of a bill of lading whether upon a sale or by way of pledge operates as a constructive delivery of the goods to which it refers, *Ramadas Vithaldas* v. *Ameerchand & Co.*[1] The common form which is adopted in England and also in commercial circles so far as I have known in India is the delivery of the share certificates and blank transfer forms enabling the pledgee to deal with them by filling up the necessary details at the time of exercising the right of sale under the pledge.

Mr. Kuttikrishna Menon relied upon a passage in Halsbury and the decision in *Harold* v. *Planty*[2]. The passage in Halsbury is as follows (Halsbury Volume 5. P. 283):

"A security may be given on shares by a legal mortgage, in which case a transfer to the mortgagee is executed and registered or by an equitable mortgage by deposit of the share certificate, with or without a transfer to the mortgagee or in blank, executed by the mortgagor,"

and in the footnote there is the following statement:

"Where a share certificate is deposited without any memorandum, the remedy of the lender is an order for transfer and foreclosure."

The case relied on for it is *Harold* v. *Planty*[2]. On a reference to that case it will be found that Cozens-Hardy, J., who dealt with a mere deposit of a certificate of shares observed as follows:

"Now it is plain that a pledgee is in a very different position from an ordinary mortgagee. He has only a special property in the thing pledged. He may obtain a sale but he cannot obtain a foreclosure. I do not think that this is properly a case of pledge. A share is a chose in action. The certificate is merely evidence of title, and whatever may be the result of the deposit of a bearer bond * * * * I think I cannot treat the plaintiff as a mere pledgee. The deposit of the certificate by way of security for the debt which is admitted, seems to me to amount to an equitable mortgage, or, in other words, to an agreement to execute a transfer of the shares by way of mortgage."

This is relied upon by Mr. Kuttikrishna Menon for the purpose of showing that Cozens-Hardy, J., was inclined to treat the deposit in that case as even more than a pledge and as conferring a greater interest than in the case of a pledge and that therefore it follows that a mere deposit of the shares would be sufficient to create an interest in the pledgee entitling him to obtain an order for sale. I am not able to agree with him in this connection. Under the English Law as pointed out

1. (1916) 31 M L.J. 541: L.R. 43 I.A. 164; I.L.R. 40 Bom. 630 at 637.
2. (1901) 2 Ch. 314.

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by Coote in his book on mortgagees and also from the observations of Cozens-Hardy, J., extracted above, a person taking a deposit of share certificates and blank transfer forms by way of security is treated as an equitable mortgagee and not a pledgee. So also a person who takes a deposit without a transfer. This is how Coote explains it:

"A share is a chose in action and where there is a simple deposit of certificate of shares unaccompanied by any transfer, the deposit will operate as an equitable mortgage like a deposit of title deeds of land and be deemed to give a right to a legal transfer of the shares, carrying with it the remedies incident to a mortgage, including the right to foreclosure." (Volume I, 9th edition, p. 315).

It will be thus seen that a deposit of certificates is treated on the same footing as a deposit of title deeds of land. But this principle will not be applicable to India where even with reference to immoveable property, as pointed out in *Lala Jyoti Prakash Nandi* v. *Lala Mukti Prakash Nandi*[1], the principle is of limited application being confined only to presidency towns. Further, as pointed out in Robbins on Mortgages on which the treatise by Coote is founded, a depositee of shares cannot exercise the right of sale unless the deposit is accompanied by a transfer of the shares. But if the deposit is accompanied by a delivery of blank transfer forms the English decisions seem to describe such a transaction indiscriminately as a pledge or as a mortgage and Coote points out that there is very little of practical importance in calling it by one name or the other because in such a transaction it is always open to the person who holds the shares to sell them, if a date is fixed for payment, on the expiry of the said date and if no date is fixed for payment, to sell them after reasonable notice, vide *Stubbs* v. *Slater*[2], so that the legal incident of sale which is attached to a pledge is also available with reference to such a transaction. And in fact the learned author points out, commenting upon the *Colonial Bank* v. *Whinney*[3], that English cases loosely use the expression "pledge" when the transaction should be described only as an equitable mortgage. This is how he remarks on p. 316 of his book:

"In one case where share certificates were deposited with a bank as security, accompanied with a blank transfer, which was inoperative as a transfer the transaction was throughout the judgments referred to as a pledge; but it seems that the term was not used in a strictly technical sense

1. (1916) 22 C.W.N. 297.
2. (1910) 1 Ch.D. 632.
3. (1886) 11 A.C. 426.

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and that if any necessity had arisen for taking into account the distinction between a pledge and a mortgage, the transaction would have been treated as one of equitable mortgage by deposit."

It seems to me therefore that as the law stands at present in India a mere deposit of share certificates would not be enough to create a valid pledge.

In the result the appeal is allowed; the decree of the learned Subordinate Judge is set aside and the decree of the District Munsif is restored with costs throughout. Leave to appeal granted.

K.S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

Kadiyala Venkata Satyanarayanamurti .. *Appellant** (*1st Respondent*).

Satyanarayanamurthi *In re.*

Madras Agriculturists' Relief Act (IV of 1938), S. 3 (iii) Proviso C—Propriety of assessment—If can be gone into in proceeding under Act IV of 1938.

Though the Court can go into evidence as to the correctness of the certificate under S. 27, if in fact there has been an assessment at a certain date it is that assessment which must govern the application of the proviso C to S 3 (iii) and the propriety of the assessment cannot be gone into.

Appeals against the orders of the Court of the Subordinate Judge of Narasapur dated 20th September, 1939 and passed in C.M.Ps. Nos. 259, 258, 264 and 263 of 1938 in O. S. No. 73 of 1935.

K. Kameswara Rao for Appellant.

The Court delivered the following

JUDGMENT:—The contention in these appeals is that for the purpose of proviso *C* to S. 3 (iii) of Act IV of 1938 the Court can go into evidence not merely as to the correctness of the certificate under S. 27 (as was held in *Kamakshi Chetti* v. *Alaganan Chettiar*[1]) but also as to the propriety of the assessment on the basis of which the person is to be qualified or disqualified as an agriculturist. We cannot accept this contention. If in fact there has been an assessment at a certain date it is this assessment which must govern the application of the

* A.A.O. No. 488 to 491 of 1940. 25th November, 1940.

1. (1940) 2 M.L.J. 468.

Satya-narayana-murti. In re,

proviso and not some theoretical figure which might have been, but was not, adopted. The appeals are dismissed under O. 41, r. 11 of the Code of Civil Procedure.

K. S. —— *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Appellate Jurisdiction.]

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice,* AND MR. JUSTICE HORWILL.

T. S. Rajan .. *Appellant* (Defendant).*

v.

Mrs. Pankajammal and another .. *Respondents (Plaintiffs).*

Rajan v. Pankaja-ammal.

Madras High Court Original Side Rules—O. 45, rr. 5 and 9—Legacy in favour of executor of will—Plea of forfeiture—Complicated questions of fact and of law raised—Regular suit and not Originating Summons appropriate remedy.

By his will the testator appointed the appellant and his brother to be his executors and he also bequeathed certain immoveable properties outside Madras City to the appellant. The executors, however, did not prove the will and with a view to avoid friction between them and the respondents, who were the widow and the daughter of the testator, they allowed the latter to apply for letters of administration. During the pendency of the said application the executors signed a statement by which they renounced their executorship in order to facilitate the administration of the estate but they did not purport thereby to affect the legacy in favour of the appellant. The Respondents took out an Originating Summons under O. 45 of the High Court Original Side Rules for establishing that the appellant had forfeited his legacy by reason of his renunciation of the executorship. The appellant contended that the proceedings were not maintainable as they constituted a suit for land outside the Jurisdiction of the Court and also pleaded that the matter should not be decided by summary procedure as it involved a close inquiry as to facts relating to the renunciation, and as, in any event, the Court could not in such proceeding direct delivery of possession of the properties to the Respondents.

Held, that the questions raised were not of such a nature as could be disposed of in a summary proceeding and that the proper course was to refer the parties to a regular suit.

Lewis v. *Green,* (1905) L.R. (2) Ch. D. 340 referred to.

Appeal against the judgment and decree of the Hon'ble Mr. Justice Gentle dated the 6th day of September 1939 and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in C. S. No. 171 of 1939 (Original Side).

A. Seshachariar and *M. Sundaram* for Appellant.

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*O.S.A. No. 54 of 1939. 13th September, 1940.

Rajan
v.
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ammal.
——
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Srinivasaraghavan for Respondents.

The Judgment of the Court was delivered by

The Chief Justice.—This appeal arises out of an Order passed by Gentle, J. on an originating summons taken out by the respondents under the provisions of O. 45 of the Rules of the Original Side of this Court. The respondents are the widow and daughter respectively of one V. Rama Ayyangar, who died on the 14th April, 1937, leaving a will dated the 25th April 1936. By his will the testator appointed the appellant and his brother, who are his nephews, to be his executors. To the appellant he left his ancestral properties situate in the village of Tirukurangudi in the Tinnevelly District. The executors did not prove the will, although it has been said in these proceedings that they acted as the executors of the will for a period. It is alleged by the appellant that there was friction between the executors and the widow and the daughter as the result of which it was impossible for the executors to carry on with the administration of the estate. The appellant says that in consequence of this friction the respondents themselves applied for letters of administration with a copy of the will annexed and on the advice of friends the executors decided not to oppose the grant. On the 25th June, 1937, while the respondents' application for letters was pending, the executors signed a statement in the following terms:

"Now, we, the said T. S. Rajan and T. S. Santhanam, do hereby declare that we have not intermeddled in the property and credits of the said deceased, and will not hereafter intermeddle therein and we do hereby renounce all our right and title to the probate and execution of the said will as we do not desire to be executors in the circumstances that have happened since the reading of the will. The will is filed herewith".

It is the appellant's case that in signing this statement he and his brother did so in order to preserve amity within the family. They were reluctant to renounce their executorships, but they did so as the result of advice that it would facilitate the administration of the estate, though their action was not intended to affect the appellant's legacy.

S. 141 of the Indian Succession Act says that if a legacy is bequeathed to a person who is named as executor of the will, he shall not take the legacy unless he proves the will or otherwise manifests an intention to act as executor. As the result of the renunciation embodied in the statement of the 5th June, 1937 the respondents contended that the appellant has forfeited the

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legacy of the testator's ancestral properties, and with a view to obtaining the directions of the Court the respondents took out this originating summons. Their right to do so was challenged by the appellant. He raised four grounds of objection, namely: (1) As the legacy comprised lands situate outside the limits of the Madras City the proceedings constituted a suit for land outside the jurisdiction of the Court and therefore the proceedings could not be maintained in this Court; (2) The appellant was not a resident of Madras and therefore an originating summons could not be taken so far as he was concerned; (3) the appellant had manifested an intention to act as executor and having done so his right to the legacy had been established; and (4) the questions in issue could not be decided with finality in summary proceedings and therefore the respondents should be relegated to a suit. The learned Judge decided all these contentions against the appellant.

In deciding the first contention, namely, that these proceedings comprised in effect a suit for land, the learned Judge did not consider the decided cases on the question, as they were not quoted to him. There are two decisions of the Calcutta High Court, *Provas Chandra Sinha* v. *Ashutosh Mukherjee*[1], *Sendayal Ramjeedoss* v. *Official Trustee of Bengal*[2] which support the appellant's contention that this is in reality a suit for land, and there is another decision of the same High Court, *Vedubala Debee* v. *The Official Trustee of Bengal*[3], to the opposite effect.

Proceedings pursuant to the issue of a summons under O. 45 constitute a suit. There is a plaint and a written statement. R. 5 of the Order says that the plaint when accepted shall be filed and numbered as an ordinary suit and entered in the register of suits, but after the serial number the letter "O. S.", shall be placed to distinguish it from plaints filed in ordinary suits. Cl. 12 of the Letters Patent only gives the Court jurisdiction in the case of suits "for land" if the property is situated within the jurisdiction of the Court. There has been much controversy in the Courts in India as to what is meant by the words "Suits for land". It is not necessary to refer in detail to the controversy, but it is manifest that here the

1. (1928) I.L.R. 56 Cal. 979. 2. (1930) I.L.R. 58 Cal. 768.
3. (1935) I.L.R. 62 Cal. 1062.

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question whether the present proceedings do constitute a suit for land within the meaning of the Letters Patent involves a substantial question of law.

We consider that the appellant's contention that this matter should not be decided in a summary procedure should prevail. Apart from the important question whether this is a suit for land the Court will have to go closely into the facts in order to decide whether the renunciation signed by the appellant on the 5th June, 1937 deprives him of the legacy. It is not sufficient for the Court to say that the statement signed by the appellant amounts to a renunciation. The appellant must be given an opportunity of calling evidence with a view to proving what transpired before he signed the document, and, when all the surrounding circumstances have been taken into consideration it will be for the Court to decide upon the effect of the document.

There is a further factor. The present proceedings will not decide the matter finally. It is admitted that the appellant is in possession of the ancestral properties of the testator, and the Court cannot in these proceedings give the respondents possession should the case be decided in their favour. In *Lewis* v. *Green*[1], Warrington, J. had to deal with similar proceedings under O. 54-A, r. 1 of the English Rules, which says that a person claiming to be interested under a deed, will, or other written instrument, may apply by originating summons for the determination of any question of construction arising under the instrument, and for a declaration of the rights of the persons interested. Warrington, J. pointed out that this rule is only intended to enable the Court to decide a question of construction where the decision, whichever way it may go, will settle the litigation between the parties. It is certainly doubtful whether the present proceedings will settle the litigation between the parties. Moreover, O. 45, r. 9 of the Original Side Rules states that the Judge hearing an originating summons may, if it appears to him that the matters in respect of which relief is sought cannot be disposed of in a summary manner, refuse to pass an order on the summons and refer the parties to a suit in the ordinary Courts. We consider that that is what the learned Judge should have done in this case. We are firmly of the

1. (1905) 2 Ch. D. 340.

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opinion that the questions here are of such a nature that they cannot be disposed of in summary proceedings.

The appeal will be allowed with the summons dismissed, the respondents being relegated to a regular suit. The costs of these proceedings will be made costs in the suit if one is filed. In order that there shall be no misunderstanding, we wish to emphasise that our judgment is intended to leave open all questions which can properly be raised in a suit. The case is an important one and there will be a certificate for two Counsel.

B.V.V. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE ABDUR RAHMAN.

Naraparaju Ramamurthy .. *Appellant* (2nd Defendant)*

v.

Parimi Venkatanarayana and another. *Respondents (Plaintiff and 1st Defendant).*

Ramamurthy v. Venkatanarayana.

Madras Local Boards Act (XIV of 1920), S. 19 and s. 1—Suit for injunction restraining holding of election—Election held since the filing of the suit—Denial that any election was held—Maintainability of suit in Civil Court.

In a suit for injunction restraining the holding of an election, the election was alleged by the defendant to have been held subsequent to the suit but the plaintiff contended that the election had not in point of fact been held. On a contention that the declaration by the Local Government was final in regard to the *factum* of election and cannot be questioned in a Civil Court,

Held, that there is no provision making a declaration by the Local Government under S. 19 final in regard to the *factum* of election and the Civil Court was entitled to entertain the claim and adjudicate on the question whether the election was held or not. If the finding in the suit was that no election was held in fact the suit for declaration can be decreed and an injunction granted.

Appeal against the decree of the Court of the Subordinate Judge of Bapatla dated 6th August, 1940, and made in Appeal No. 213 of 1939, preferred against the decree of the Court of the District Munsif of Bapatla in O. S. No. 79 of 1939.

K. Rajah Aiyar and *N. Krishnamachari* for Appellant.

B. Jagannadha Das for Respondents.

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* S. A. No. 633 of 1940. 25th October, 1940.

Ramamurthy v. Venkatanarayana.

The Court delivered the following

JUDGMENT.—An order was passed by the President of the District Board of Guntur on the 7th February, 1939, appointing defendant 1 as temporary President to conduct an election of the President of the Panchayat Board of Inukollu (Ex. XXV). Notices to the members of the Panchayat Board intimating that the election of the President would be held on the 25th February, 1939, are stated to have been issued on the 16th February, 1939, Exs. XII to XXIII. It was alleged on behalf of the first and second defendants that certain proceedings took place on the date mentioned in which the second defendant was elected to be the President. An order was passed by the Government of Madras on the 12th May, 1939, G. O. No. 1879 (Ex. VIII), holding that the second defendant was validly elected. It is not necessary for me to refer to any more letters written by or on behalf of the Inspector of Municipal Councils subsequently. But before the election was held on the 25th February, 1939, a suit was instituted by the plaintiff against defendant 1 for an injunction restraining him from holding an election. A temporary injunction was also asked for but it was not granted. After the so-called election the second defendant was impleaded by an order of this Court passed in C. M. P. 2481 of 1939 on the 6th June, 1939, as a party to the suit.

The main question that has to be decided now relates to the maintainability of the suit. The plaintiff alleged that in point of fact there was no election. The first Court, the District Munsif of Bapatla held against the plaintiff but on appeal his judgment was reversed by the Subordinate Judge and the suit decreed. The second defendant has consequently come up to this Court in second appeal.

S. 9 of the Code of Civil Procedure provides that:

"The Courts have jurisdiction to try all suits of a civil nature except suits of which their cognisance is either expressly or impliedly barred".

In order to determine therefore whether the present suit is not maintainable in a Civil Court, I have to decide whether the cognisance of the present suit is either expressly or impliedly barred. Learned counsel for the appellant contends that S. 19 of the Madras Local Boards Act read along with r. 1 framed by the Local Government constitutes the bar and the Civil Courts are not entitled to adjudicate on this question. The contention on behalf of the plaintiff really is that there was no

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election at all. He is not objecting to the election on the ground of any irregularity but denies the election having been held on the 25th February, 1939. S. 19 of the Act provides that the election or appointment of a President of a Local Board shall be notified in the prescribed manner. This obviously has no application at the present moment. R. 1 framed by the Local Government under the Local Boards Act reads as follows:

"Save as otherwise provided, no election held under the Act whether of member, President or Vice-President of a local board shall be called in question except by an election petition presented in accordance with these rules to the election Commissioner as defined by Sub-r. 2 by any candidate or elector against the candidate who has been declared to have been duly elected (hereinafter called the returned candidate)".

It assumes that an election was held under the Act and if an election is admitted to have been held, there is no doubt that the procedure would be as provided for by this rule and it could not be called in question except by an election petition. But as pointed out above, that is not the dispute in this case. The contention is that no election was held. This rule does not debar a Civil Court from going into the question whether an election was in point of fact held or not. If the Court comes to a finding that an election was held, it must at once stay its hands and allow the procedure under r. 1 to take its normal course. If, on the other hand, it comes to a decision that no election was held, its duty is equally clear. It must grant a declaration that no election was held. It is not necessary for me to go into the question as to what would happen to the notification issued by the Local Government declaring that an election was actually held or what the result of that particular election was. No authority has been shown to me that this declaration by the Local Government is final in regard to the *factum* of election and cannot be questioned in a Civil Court. In the absence of any such provision, the provision contained in S. 9, Civil Procedure Code, must be allowed to have its full effect. My attention was drawn by learned counsel for the appellant to S. 234 (3) where it is laid down that the action of the Local Government in regard to certain matters mentioned in that section would be final and binding on the authorities mentioned in that section. That section has no application to the present case. It clearly shows that, whenever the Legislature wished to make a decision by the Local Government final,

it said so. Nothing has been said in the Act declaring a notification by the Local Government under S. 19 to be final in regard to the *factum* of election and, in the absence of any such provision, it is impossible to hold that the Civil Courts have no power to adjudicate on that question.

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A feeble attempt was made towards the end to contend that the Local Government should have been impleaded as a defendant in the case, but no such objection was ever raised at the time when the suit was taken up for trial and it is impossible for a party to raise an objection regarding non-joinder for the first time in second appeal. I would therefore hold that the Civil Court was entitled to entertain the present claim and adjudicate on the question whether the election was held or not. The lower appellate Court's finding that the election was not held in fact is a finding of fact and binds me in second appeal. It would therefore follow that the suit for declaration was rightly decreed. As regards the injunction my attention was drawn by learned counsel for the appellant to S. 295 (*a*) of the Act, but under that section an injunction cannot be issued for the preparation or publication of the electoral rolls or for the conduct of any election. We are not dealing either with the preparation or publication of electoral rolls or with the conduct of any election in this case. If we were, S. 225 (*a*) of the Act would certainly apply. But unfortunately for the appellant we are not. In view of the fact that the lower Court came to the decision that the election was not held, not only was a decree for declaration correctly passed by the Court, but the relief as to injunction was rightly granted. The result is that the appeal fails and is dismissed with costs.

Leave to appeal refused.

K. S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTCE WADSWORTH.

Ambujammal .. *Petitioner* (Respondent)*

v.

P. Thangavelu Chettiar and another. *Respondents (Petitioner and auction purchaser).*

Execution—Sale in execution of decree—Purchase by third party—Decree set aside on appeal—Effect on right to confirmation of sale.

Ambuja-ammal v. Thangavelu Chettiar.

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* C.R.P. No. 707 of 1940. 20th November, 1940.

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There is no provision in the Code for the cancellation of a sale in execution merely because of the cancellation of the decree and though it is in accordance with justice that a person who has succeeded in appeal should get from the opposite party such restitution as is possible, there is no principle of justice whereby an innocent third party who has purchased in a valid auction held by the Court should be deprived of his property merely because the decree under which the sale was held has been cancelled in appeal.

Consequently the executing Court has power to confirm the sale in execution of a decree notwithstanding that on the date of the confirmation the decree had been set aside on appeal and had ceased to have a judicial existence.

Sorimuthu Pillai v. *Muthukrishna Pillai*, (1932) 65 M.L.J. 253: I.L.R, 56 Mad. 808, followed.

Petition under S. 115 of Act V of 1908 praying that the High Court will be pleased to revise the order of the City Civil Court, Madras, dated 15th March, 1940 and made in E. P. No. 821 of 1938 in O. S. No. 1139 of 1938.

V. V. Srinivasa Aiyangar and *V. R. Srinivasan* for Petitioner.

V. T. Rangaswami Aiyangar, K. S. Sankararaman, V. Govindarajachari and *V. Natesan* for Respondents.

The Court delivered the following

JUDGMENT.—This revision petition challenges the correctness of an order confirming a sale when the decree upon which the sale was based had been set aside in appeal in the interval between the holding of the sale and the passing of the order of confirmation. Under this decree there were two sales. At the first the decree-holder was the purchaser and the sale was set aside. On 11th December, 1939, there was a fresh sale and the present respondent, a stranger, purchased the property. Against this sale also there was an application under O. 21, r. 90, Civil Procedure Code. That application was dismissed on 25th January, 1940; but for some reason the sale was not immediately confirmed. On 30th January, 1940, the defendant's appeal succeeded and the suit was dismissed. On the following day the executing Court was appraised of this result and the matter of the confirmation of the sale was adjourned. Meanwhile a review application was filed against the dismissal of the application under O. 21, r. 90. This review application was rejected on 15th March, 1940 and the sale was forthwith confirmed. It is contended that the executing Court had no jurisdiction to proceed with the execution of a decree which had ceased to

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have a judicial existence and that consequently the confirmation of the sale which is a step in aid of execution is an invalid act which has to be set aside.

Mr. Venkatachari for the petitioner admits that the decision of Madhavan Nair, J., in *Sorimuthu Pillai* v. *Muthukrishna Pillai*,[1] is against him, but he contends that this decision is wrong. In support of this contention he points out that the learned Judge has been led astray by relying upon an incorrect head-note in order to differentiate the case of *Ariatullah* v. *Sashi Bhusan Hhuasrah*.[2] The facts of the latter case are rather complicated, but I have satisfied myself that the head-note in the Indian Cases report is incorrect and that this was a case in which a sale was held under a decree which at the time of the sale subsisted, but by the time when the sale came up for confirmation after a long series of judicial events which I need not elaborate, that decree had ceased to exist. The learned Judges held that in such a case confirmation of the sale ought to be refused. A similar view was also taken in a decision by a Bench of the Nagpur Chief Court (vide *Hariram* v. *Gopikisan*.[3]) But I doubt very much whether this view is now tenable having regard to the more recent decisions of the Privy Council. In the case of *Seth Nankelal* v. *Umrao Singh*[4], the Privy Council had to deal with the case of a sale to a third party under a decree which was satisfied by a compromise between the parties in the interval between the sale and the confirmation. Their Lordships held that the parties to the suit could not get rid of the sale to a third party merely by asserting that the decree had been satisfied out of Court and that the only means by which the sale could be avoided were those embodied in O. 21, and that if within 30 days of the sale there is no such application, it was obligatory on the Court under r. 92 to pass an order confirming the sale not withstanding the circumstance that the decree-holder had admitted satisfaction of the decree. In this case it is pointed out that when the interests of a third party intervene, it is no longer a matter between the decree-holder and the judgment-debtor and that the process of confirmation follows automatically under r. 92

1. (1932) 65 M.L.J. 253: I.L.R. 56 Mad. 808.
2. (1919) 55 I.C. 547: 24 C.W.N. 73.
3. A I.R. 1921 Nag. 121.
4. (1930) 60 M.L.J. 423: L. R. 58 I.A. 50 (P.C.).

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when there had been no application under rr. 89 to 91 or any such application has been disallowed. That is essentially the view taken by Madhavan Nair, J., in the case already referred to. The learned Judge points out that under S. 316 of the Code of 1882 there was a proviso the effect of which was that confirmation should follow provided that "the decree under which the sale took place was still subsisting at that date" and under that section the date of the sale was the date of the confirmation. Under S. 65 of the present Code the property is deemed to vest in the purchaser from the date of the actual sale and not from the date of the confirmation and there is a significant omission of this proviso making the existence of the decree an essential condition for the confirmation of the sale. The learned Judge comes to the conclusion in the light of this alteration of the Code as well as of the mandatory language of r. 92, that even though the decree has been set aside after the sale and before confirmation a sale in favour of a stranger-purchaser must nevertheless be confirmed if the sale cannot be set aside under the provisions of rr. 89 to 91 of O. 21. The same view has been taken by a Bench of the Nagpur High Court in a recent case, *Biridichand* v. *Ganpatsao*.[1] So far as I am aware the decision of Madhavan Nair, J., which was passed in 1932 has not been doubted by any decision of this Court. It is argued by Mr. Venkatachari that there are circumstances in which the Court is entitled not to confirm a sale and he quotes *Raghavachariar* v. *Murugesa Mudali*[2] as illustrating the fact that the Court may under its inherent powers refuse to confirm a sale in a case where the sale has been brought about owing to a fraud on the Court. Granting so much, it seems to me that there could be no question of the exercise of the inherent powers in the present circumstances so as to safeguard the judgment-debtor by doing an injury to an innocent auction-purchaser. Whether or not there should be a right to challenge a sale under a valid decree is to my mind purely a question of policy and not a question of justice. There must be a power in the Court to enforce its decrees. That power is in many cases the power of sale. Certain safeguards are given whereby judgment-debtors can get a sale cancelled within a certain time. There is no provision in the Code for the cancellation of a sale

1. A.I.R. 1938 (Nag.) 525.
2. (1923) 44 M.L.J. 680: I.L.R. 46 Mad. 583.

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merely because of the cancellation of the decree and though it is in accordance with justice that a person who has succeeded in appeal should get from the opposite party such restitution as is possible, there is no principle of justice whereby an innocent third party who has purchased in a valid auction held by the Court should be deprived of his property, merely because the decree under which the sale was held has been cancelled in appeal. On general principles the judgment-debtor can look to the decree-holder to give restitution when the decree has been set aside in appeal, but there is no general principle which would give him a similar right to look to a third party who has for good consideration purchased the property sold through the Court. It seems to me to follow therefore that the inherent powers of the Court cannot be called in aid to justify a power for which the Code contains no provision, when the desirability of the existence of such a power is purely a matter of policy upon which two opinions may quite well be taken. It seems to me therefore that the balance of authority is in favour of the view taken by Madhavan Nair, J., and personally I see no reason to take a different view.

The petition is therefore dismissed with costs of the second respondent.

K.S. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

C. S. Jagannatha Aiyangar .. *Appellant* (Petitioner)*

v.

Senniveera Chettiar and another .. *Respondents (1st Respondent and Nil).*

Jagannatha Aiyangar v Senniveera Chettiar.

Madras Agriculturists' Relief Act (IV of 1938), S. 10 (2) (1)—Stipulation that mortgagee was to enjoy the usufruct for two years and in default of redemption then to receive interest at 3 per cent per annum in addition to usufruct—If immune from scaling down provisions—S. 8 (2) enjoyment of usufruct—If can be deemed to be a payment of interest under S. 8 (2)—S. 21—Application by insolvent—Procedure.

A mortgage stipulated that the properties shall be enjoyed by the mortgagee for two years in lieu of interest, that on the expiry of two years, the mortgagor shall pay the amount due and if he failed to do so the mortgagee shall retain the right to enjoy the usufruct of the properties and shall also be entitled to interest at three per cent per annum in addition to the usufruct. On an application for scaling down,

*A. A. A. O. No. 130 of 1939. 18th November, 1940.

Jagannatha Aiyangar *v.* Senniveera Chettiar.

Held, that (*i*) this was a mortgage under which a rate of interest was stipulated and was therefore not saved by S. 10 (2) (1) of Act IV of 1938 and hence was liable to be scaled down.

(*ii*) The enjoyment of the produce cannot be deemed to be a payment to the creditor by the debtor falling under S. 8 (2) of the Act.

(*iii*) S. 21 in its plain terms contemplates an application by the person who would have been an agriculturist but for his adjudication. To such an application the Official Receiver in whom the estate vests should be impleaded as a party.

Appeal against the order of the District Court of Coimbatore dated the 9th August, 1939, and passed in C. M. A. No. 46 of 1939 preferred against the order of the Court of the Subordinate Judge of Coimbatore in I. A. No. 622 of 1938 in I. P. No. 42 of 1934.

A. C. Sampath Aiyangar for Appellant.

D. Ramaswami Aiyangar, T. P. Kannabiran and *M. V. Gopalratnam* for Respondents.

The Court delivered the following

JUDGMENT.—The appellant in this case is an insolvent who applied to the Insolvency Court under Ss. 8 and 9 of Madras Act IV of 1938 to scale down the amount due on a mortgage. The mortgage in question is Ex. I dated 15th July, 1931, for a principal sum of Rs. 10,650, made up of four items of consideration. One is a prior mortgage on which Rs. 7000 was due for principal and Rs. 1858-8-0 was due for interest. Ex. I stipulates that the properties shall be enjoyed by the mortgagee for two years in lieu of interest, that on the expiry of two years, the mortgagor shall pay the amount due and if he fails to do so, the mortgagee shall retain the right to enjoy the usufruct of the properties and shall also be entitled to interest at three per cent per annum in addition to the usufruct. The Courts below have held that this provision for interest is to be regarded as a penalty and that for the purposes of S. 10 (2) (*i*) of the Act it may be ignored and the mortgage treated as a possessory mortgage without any rate of interest stipulated and therefore immune from the scaling down provisions of the Act. It seems to me that these decisions overlook the plain terms of S. 10 (2) (1) of the Act. That clause recites:

"Nothing contained in Ss. 8 and 9 shall affect any mortgage by virtue of which the mortgagee is in possession of the property mortgaged, where no rate of interest is stipulated as due to the mortgagee."

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I am asked to add to this clause the words 'in respect of such possession', and to treat this contract as a contract in which there is no rate of interest stipulated so far as the right to possession is concerned and to regard the provision for interest in default as a sort of additional contract which is liable to be scaled down, leaving the main contract immune from the provisions of the Act. It seems to me improper to put into this clause words which are not there and equally improper to treat this single contract as if it were two separate contracts. No doubt, the mortgage with which we have to deal is not, strictly speaking, a usufructuary mortgage, for it contains a covenant to pay and it contains a stipulation for cash interest in addition to the right to the usufruct in case of a breach of this covenant. But S. 10 (2) (1) is not confined to mortgages which are usufructuary mortgages within the terms of S. 58 (*d*) of the Transfer of Property Act. The clause provides a special exemption for any mortgage under which the mortgagee has possession and no rate of interest is stipulated. It does not apply to a mortgage in which, although the mortgagee is in possession, a rate of interest is stipulated and it seems to me to make no difference whether the rate of interest stipulated in the mortgage is one which might be regarded as a penalty or not. I wish to make it clear that I express no opinion on the question whether on the terms of this particular mortgage the default rate should or should not be regarded as penal. To my mind, this is a mortgage under which a rate of interest is stipulated. It is therefore not saved by S. 10 (2) (1) of the Act and it is liable to be scaled down.

It remains to consider how the scaling down process is to be carried out. It is contended for the petitioner that the Court should calculate the cash value of the produce enjoyed by the mortgagee and treat this cash value as a payment made by way of interest to the mortgagee and apply the rule in S. 8 (2) of the Act. This contention overloooks the fact that there has been no payment to the mortgagee at all. All that has happened is that the mortgagee has had the right to enjoy whatever produce the land might yield. His enjoyment of this produce is not a payment by the mortgagor for principal or interest to the mortgagee. It is a special arrangement whereby the mortgage is to some extent free of interest, the mortgagee getting his compensation by the enjoyment of the produce. To

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my mind, such enjoyment of the produce cannot be deemed to be a payment to the creditor by the debtor falling under S. 8 (2) of the Act. When so much is decided, the scaling down process becomes simple. The amount of Rs. 1858-8-0 representing interest on the prior mortgage is to be deducted from the principal under the explanation to S. 8, so that the principal amount due will be Rs. 8791-8-0. This sum will carry interest at three per cent from 1-10-1937.

A question has been raised as to the procedure under S. 21 of the Act, where the application is made by or on behalf of a person who would have been an agriculturist but for his adjudication in insolvency. The question is not one of any importance in this appeal, for, though the insolvent himself has filed the application, the Official Receiver has been impleaded both here and in the Court of first instance. S. 21 in its plain terms seems to me to contemplate an application by the person who would have been an agriculturist but for his adjudication. But it seems to me proper that to such an application, the Official Receiver in whom the estate vests should be impleaded as a party.

In the result, therefore, the appeal is allowed and the debt will be scaled down in the manner indicated above. The parties will pay and receive costs throughout proportionate to their failure or success in all the Courts, the appellant having contended that the debt was entirely discharged except for a sum of Rs. 3183 and succeeding only to the extent of Rs. 1858-8-0 with interest up to 1st October, 1937.

K. S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE ABDUR RAHMAN.

Vattappa Kone and another .. *Appellants* (Defendants Nos. 1 & 2.)*

v.

Muthukaruppan Servai .. *Respondent (Plaintiff).*

Vattappa Kone v. Muthukaruppan Servai.

Tort—Malicious prosecution—Verbal complaint to village magistrate charging the plaintiff with robbery—If absolutely privileged.

A verbal complaint was made by the defendant against the plaintiff to a village magistrate charging the plaintiff with the offence of robbery. The

* S. A. No. 1071 of 1937. 5th November, 1940.

Vattappa Kone *v.* Muthu-Karuppan Servai.

Village Magistrate sent a report on the same day to the police and to the Stationary Sub-Magistrate. The Magistrate ordered an enquiry by the police who subsequently made a report that the complaint was false. The plaintiff was not even summoned. The Magistrate thereupon declined to take any further action and the proceedings were dropped. In a suit for damages for malicious prosecution,

Held, (i) As the plaintiff was not prosecuted he could not bring an action for damages for malicious prosecution. *Sheik Meeran Sahib* v. *Ratnavelu Mudali*, (1912) I.L.R. 37 Mad. 181: 25 M.L.J. 1, *Sanjivi Reddy* v. *Koneri Reddi*, (1925) I.L.R. 49 Mad. 315: 50 M.L.J. 460 and *Arunachalam Mudaliar* v. *Chinnusamy Chetty*, (1926) 24 L.W. 22 relied on.

(ii) The claim was not sustainable as one for bringing a false charge as something different from either defamation or malicious prosecution. *Nagendra Nath Ray* v. *Basanta Das Bairagya*, (1929) I.L.R. 57 Cal. 25 referred to.

(iii) The statement made in a complaint to a Magistrate, or to a police officer with a view to its being repeated on oath before the Magistrate is absolutely privileged, *Bapalal & Co.* v. *Krishnaswami Iyer*, (1940) 2 M.L.J. 556, relied on.

(iv) As the occasion was privileged no action for damages for defamation will lie, *Sessions Judge, Tinnevelly* v. *Sivan Chetty*, (1909) I.L.R. 32 Mad. 258 (F.B.) and *Peria Goundan* v. *Kuppa Goundan*, (1919) 37 M.L.J. 234, distinguished.

Appeal against the decree of the Court of the Subordinate Judge (Principal) of Ramnad at Madura in A. S. No. 58 of 1937 (A. S. No. 195 of 1936, District Court, Ramnad) preferred against the decree of the Court of the District Munsif of Paramakudy in O. S. No. 158 of 1935.

T. R. Srinivasan for Appellants.

R. Srinivasa Iyengar for Respondent.

The Court delivered the following

JUDGMENT.—The only question to be determined in this appeal is whether a suit for damages for malicious prosecution would be maintainable when no summons was issued to the plaintiff on a verbal complaint made against him to a Village Magistrate charging him with the offence of robbery. The facts may be briefly stated. Defendants 1 and 2 were stated to have lost some sheep on the 8th of September, 1934. They went on the next day to the village Magistrate of Mudukulathur and made a statement to him that certain persons including the plaintiff had taken away their sheep by force. The facts stated by the defendants would have made the persons charged liable to be prosecuted for robbery. The Village Magistrate sent a report on the same day to the police and to the Stationary Sub-Magistrate. The Magistrate appears to have ordered an enquiry by the police which made a report on the 15th January, 1935

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that the complaint made by the defendants 1 and 2 was false and that no robbery had taken place in fact. He (the Magistrate) thereupon declined to take any further action and the proceedings were dropped. During the enquiry conducted by the police, the plaintiff was not even summoned. He says that he was not called by the police as he had apprehended an arrest and run away after he came to know of the complaint. The plaintiff brought a suit for damages for malicious prosecution on these allegations. It was decreed by the District Munsif of Paramakudi and the decree was confirmed by the Subordinate Judge of Ramnad, at Madura. The question to decide is whether in those circumstances an action for damages was competent.

From the facts which have been given above it would be clear that the plaintiff was not prosecuted and he could not for that reason, bring an action for damages for malicious prosecution. If any authority is required for that view, it would be found in *Sheik Meeran Sahib* v. *Ratnavelu Mudali*[1] and in a later decision of a Division Bench of this Court in *Sanjivi Reddy* v. *Koneri Reddi*[2]. These two decisions were followed by Sir Owen Beasley in *Arunachalam Mudaliar* v. *Chinnusamy Chetty*[3].

But it has been contended on behalf of the respondent that his suit was not one in respect of malicious prosecution but for bringing a false charge which is different from either defamation or malicious prosecution. This was attempted to be supported by a decision in *Nagendra Nath Ray* v. *Basanta Das Bairagya*[4] where the following dictum of Sir Lawrence Jenkins, C. J., in *Golap Jan* v. *Bholanath Khettry*[5] was cited with approval. The dictum of the learned Chief Justice was as follows:

"There are certain wrongs akin to malicious prosecution which entitle the person aggrieved to sue, as for instance, malicious abuse of the process of the Court, malicious arrest, malicious search and malicious execution".

This does not however remove the real difficulty. The statement or complaint to a police officer is not first of all covered either by the kindred wrongs mentioned by Sir Lawrence Jenkins in Golap Jan's case or by other well known actionable wrongs such as those of false imprisonment etc.

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1. (1912) I.L.R. 37 Mad 181: 25 M.L.J. 1.
2. (1925) I.L.R. 49 Mad. 315: 50 M.L.J. 460.
3. (1926) 24 L.W. 22.
4. (1929) I.L.R. 57 Cal. 25.
5. (1911) I.L.R. 38 Cal. 880.

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And, secondly, statements made in a complaint to a Magistrate or even to a 'police officer which could only be made with a view to their being repeated on oath before the Magistrate were held in this Presidency to be absolutely privileged'. This was held by Sir Murray Coutts Trotter, C.J. in *Sanjivi Reddy* v. *Koneri Reddy*[1] and followed by my learned brother King, J. recently in *Bapalal & Co.* v. *Krishnaswami Iyer*[2].

The third difficulty in the plaintiff's way appears to be insurmountable even if the allegations made by the defendants 1 and 2 in their statement to the Village Magistrate are held to be defamatory. Defamation is undoubtedly one of the actionable wrongs; but in order to prove the same one must be able to put those allegations in evidence. If they are found to have been made on an occasion which is found to be absolutely privileged, as held in Sanjivi Reddi's case, they could not be permitted to be referred to and the contention raised by learned Counsel for the respondent must be for that reason alone repelled. My attention was drawn by him to the Full Bench decision in the *Sessions Judge of Tinnevelly* v. *Sivan Chetty*[3]. It has no application as the only question raised in that case was whether a person giving false information about an alleged offence to a Village Magistrate could be prosecuted for an offence under S. 211 Indian Penal Code. I am not concerned here whether the defendants had committed an offence under S. 211 or not. As the making of a false charge or the institution of a criminal proceeding with intent to injure knowing that there is no just or lawful ground for such a charge or proceeding is itself an offence, the reference to the charge made by a person or to the proceeding taken by him cannot obviously fall within the doctrine of absolute privilege applied by the learned Chief Justice, to Sanjivi Reddi's case. But the position becomes changed when one comes to deal with the charge or complaint in a collateral proceeding such as a civil suit for damages for defamation. The Full Bench decision would therefore have no application to this case. Reliance was again placed on behalf of the respondent on *Peria Goundan* v. *Kuppa Goundan*[4]. The facts of that case do not seem to have been given in the report very fully. I sent for the original records and found that the plaintiff was actually prosecuted by the police in that case and a

1. (1925) 50 M.L.J. 460: I.L.R. 49 Mad. 315. 2. (1940) 2 M.L.J. 556.
3. (1909) I.L.R. 32 Mad. 258. 4. (1919) 37 M.L.J. 234.

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charge was framed against him by the Deputy Magistrate of Salem but he was eventually acquitted. It is clear in those circumstances that the plaintiff was actually prosecuted and a suit for damages for malicious prosecution was if I may say so with respect rightly held to be maintainable.

For the above reasons I am constrained to accept the appeal and dismiss the suit, but in the circumstances of the case I leave the parties to bear their own costs throughout.

(Leave refused).

K. S. *Appeal allowed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Allahabad.]

PRESENT:—LORD THANKERTON, LORD RUSSELL OF KILLOWEN, SIR GEORGE RANKIN, LORD JUSTICE GODDARD AND MR. M. R. JAYAKAR.

P.C. — Nathu Lal v. Mt. Gomti Kuar.

Nathu Lal and others .. *Appellants**

v.

Musammat Gomti Kuar and others .. *Respondents.*

Deed—Alteration after execution without consent of party to be charged—Effect if alteration material—Principles of English law applicable in India.

The rule of English law relating to the effect of material alterations in a deed made after the execution by or with the consent of any party to it but without the consent of those liable under it is applicable also in India. Such an alteration avoids the deed, not *ab initio* so as to nullify its conveyancing effect, but so as to prevent the person making the alteration or those claiming under him from putting the deed in suit for the purpose of enforcing an obligation undertaken by it. A material alteration is one which varies the rights, liabilities or legal position of the parties

A mortgage by conditional sale was evidenced by a deed of sale and by a deed of release of the same date. The plaintiffs in an action to redeem the mortgaged properties had made a hole in the deed of release as a result of which its date, 25th March, could be read as 26th March, the date borne by the plaintiff's copy of the sale deed. The Indian date in the deed had however not been tampered with, and the corresponding Christian date was ascertainable as 25th March, 1844. Further a hole had been made in the document after the words "has sold" but the word "shartia" (conditionally) remained sufficiently discernible.

Held. on those facts that the alterations were not material and that the deed of release could be relied on for the purposes of the redemption action

Namdev Jayaram v. *Swadeshi Vyapari Mandali, Ltd.* A.I.R. 1926 Bom. 491, explained.

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* P. C. Appeal No. III of 1936 27th May, 1940.
Allahabad Appeal No. 31 of 1933.

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Appeal from a decision of the High Court, Allahabad, dated 8th March, 1933, reversing a decision of the Additional District Judge, Moradabad, dated 12th January, 1931, which confirmed a decision of the Munsif of Chandansi dated 4th June, 1929.

The facts are fully set out in the judgment.

L. P. E. Pugh K. C. and *J. M. Pringle* for Appellants.

J. M. Parekh for Respondent.

Their Lordships' judgment was delivered by

Mr. Jayakar.

MR. M. R. JAYAKAR.—The suit out of which this appeal arises was brought on the 8th September, 1928, by the appellants (plaintiffs 3-5) and respondents 29 and 30 (plaintiffs 1 and 2) against respondents 1-28 (defendants 1-28), claiming redemption of certain properties on the allegation that the deed of sale of the said properties dated the 25th March, 1844, executed by one Gulab Singh (the representative in interest of the plaintiffs) in favour of Het Ram and Tula Ram (the representatives in interest of the defendants) and an alleged agreement to transfer the said properties bearing the same date and executed by Het Ram and Tula Ram in favour of Gulab Singh formed one transaction and constituted a mortgage by conditional sale of the properties comprised in the sale-deed.

In the plaint, the plaintiffs mentioned the 26th March, 1844, as the date of the mortgage completed by the execution of the two documents and they filed with the plaint a certified copy of the sale-deed (which is marked Exhibit I) bearing date the 26th March, 1844, and the original agreement to transfer of the same date (which is marked Exhibit B). The defendants, who represent the original mortgagees and their alienees, filed separate written statements, in which they denied the right of the plaintiffs to redeem on various grounds.

On the 15th April, 1929, the Munsif, before whom the suit was filed, framed ten issues, of which only the following is now material:—

"Did Gulab Singh execute a sale-deed in favour of Tula Ram and Het Ram on the 26th March, 1844, and did the latter on the same date execute an agreement to release the property in favour of the former, as alleged on behalf of the plaintiffs? If so, by these documents did the parties intend to create a mortgage by conditional sale?"

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On the same date, the defendants 3 and 4 filed in Court the original sale-deed, which is marked Exhibit A and bore the date, the 25th March, 1844. As this date did not correspond with the date in the certified copy filed with the plaint, the plaintiffs applied on the 23rd April, 1929, for permission to amend the plaint by altering the date 26th March, to 25th March. The ground on which this amendment was sought was that the 26th March, was written on account of a clerical error but that the correct date was the 25th. This application was opposed by the defendants on various grounds. The Munsif, however, allowed the amendment of the plaint by his order dated that 29th April, 1929. The issue was thereupon amended by the addition of the words "now in view of the amendment of the plaint, 25th March, 1844", after the words "26th March, 1844", occurring in the issue as originally framed. As the issues involved in this case depend upon the wording of the two documents, it will be useful to set out their material portion:—

"EXHIBIT—A. SALE-DEED.

I, Gulab Singh, . . . do make a valid and solemn declaration as follows:—

Five biswas of zamindari property (specified in the deed) . . . are by right of inheritance in my proprietary possession and enjoyment. Up to the time of this sale, which is correct, valid and free from the rights of others . . . . the property was in my proprietary possession and enjoyment. Now I have sold the above biswas with all the rights and appurtenances . . . . for Rs. 2,550 of Kaldar coins . . . . to Het Ram and Tula . . . The sale is valid, legal, correct and enforceable. It is free from pernicious and false conditions. I have received the entire amount mentioned above from the said vendees and have appropriated the same and made over the said property sold to them. Exchange of consideration has taken place between the parties. The vendees have ceased to have any claim in respect of the sale consideration and I, the vendor, have ceased to have any claim in respect of the said biswas sold. If in future anyone comes forward as a partner and co-sharer of the said property sold, I shall be liable to set up a defence in respect thereof. Hence, I, in a sound state of body and mind, have executed these few presents by way of a sale-deed, so that it may serve as evidence and be of use whenever needed.

Dated—25th March, 1844. Sd. Gulab Singh.

EXHIBIT—B. AGREEMENT TO RELEASE.

Thakur Gulab Singh . . . has sold (paper torn) the said qasba to these executants for Rs. 2,550 of the Kaldar coins and the mutation of names will be effected in the Nizamat office, district Moradabad. Hence we have covenanted and given in writing that whenever Thakur Gulab Singh, vendor of the said village, or his collateral heirs pay the amount of the sale-deed in a lump sum after expiry of the period of twenty-five years, that is with effect from 1251 Fasli to 1275 Fasli, these executants or our heirs shall

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willingly get the names of Gulab Singh or his heirs recorded in and our names and those of our heirs expunged from the papers of the Nizamat court, district Moradabad. We or our heirs shall put forth no excuses. If, perchance, we or our heirs put forth any excuse in accepting the amount of the sale-deed in respect of the said village, Gulab Singh or his heirs shall be authorised to deposit the amount of the sale-deed in the Hon'ble High Court, get their names recorded and our names or those of our heirs expunged. We or our heirs shall have no objection. After expiry of the period of twenty-five years, Thakur Gulab Singh or his heirs shall be authorised to pay the amount of the sale-deed whenever they may like it and get the property sold released from us or our heirs and representatives. We or our heirs shall have no objection. If we do so, it shall not be entertained in the Nizamat Court of the High Court. Hence we have executed these few presents by way of a conditional agreement, so that it may serve as evidence and be of use whenever needed.

Written on 26th March, 1844, corresponding to Chait Sudi 6th, 1251 Fasli. Signature of Het Ram aforsaid. Signature of Tula Ram aforesaid."

It may be mentioned that the agreement to release, when it was filed with the plaint, had two holes, one just above and partly eliminating the date 26th occurring at the end of the document and the other after the words, "has sold" occurring in the first line. On the 18th May, 1929, when arguments were being heard, respondent 15 made an application alleging that the holes were made subsequent to the filing of the said document in Court. The Munsif enquired into the allegation and held that it was utterly baseless. On considering the effect of the torn parts of the document, he was of opinion that they were of no consequence and that the document was genuine. As the document purported to be more than 30 years old and was produced from proper custody, he admitted it, exercising the discretion vested in him under S. 90 of the Indian Evidence Act to presume that the signatures and attestations were genuine.

On the main issue the Munsif held that Gulab Singh executed the sale-deed (Exhibit A), in favour of Het Ram and Tula Ram on the 25th March, 1844, and, on the same date, Het Ram and Tula Ram executed the deed of agreement (Exhibit B) in favour of Gulab Singh, and that by these two documents the parties intended to create a mortgage by conditional sale. Accordingly, he ordered redemption of the property on payment of Rs. 2,550 to defendants 3-6, 8-18, 21-26 within six months. The property to be redeemed was specified in the decree.

The defendants appealed to the Court of the Additional District Judge of Moradabad on the 17th July, 1929. Their

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appeal was heard on the 12th January, 1931, and the Judge delivered judgment confirming the findings of the Munsif. He agreed with the Munsif that the holes were made before the filing of the suit and that when the plaintiffs were about to file the suit and found that the date mentioned in the copy of the sale-deed was the 26th March, 1844, and the agreement bore the date, the 25th March, 1844, they thought that it would be absurd that the agreement preceded the sale, so they or their advisers made a hole, so that the agreement might not read as of the 25th March, 1844, and it might be possible to read it as of the 26th March, 1844. He also found that the agent of the mortgagee Tula Ram managed to procure an inaccurate copy of the sale-deed and handed it over to the plaintiff's ancestors, that, consequently, the plaintiffs or their predecessors could not be held responsible for the copy not being correct, and that fact did not in any way affect the genuineness of the agreement. On carefully considering the place and other details relating to the hole, he came to the conclusion that the date in the agreement was the 25th March, 1844, and that the hole was made to eliminate the figure "5" and the Urdu letter "*pay*" so that the date might be read as the 26th.

It may be noted here that the vernacular date in the said agreement, namely, "Chait Sudi 6 1251 Fasli" was not tampered with and remained intact and that it was possible, on a reference to the calendar, to find its equivalent Christian date, namely, the 25th March, 1844. On the question whether the Munsif had properly exercised his discretion to admit the document without proof under S. 90 of the Indian Evidence Act, he agreed with the Munsif and on a comparison of the signatures on the document of the executants and the attesting witnesses with their signatures on other documents he held that they tallied. As regards the hole in the earlier part of the document occurring after the words, "has sold" he held that though the paper of the document was torn at the place, the word "shartia" (meaning conditionally) could be seen in spite of the torn portion, and that this word clearly indicated that Het Ram and Tula Ram admitted that the sale was a conditional one and that consequently the contract was one of mortgage and not of sale. A decree was passed accordingly.

Against that judgment and decree the defendants appealed to the High Court of Allahabad on the 3rd February, 1931.

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The appeal was heard as a second appeal by a bench composed of Iqbal Amad and Kisch, JJ. The learned Judges confirmed the findings of the lower Court that the transaction was a mortgage by conditional sale evidenced by the two documents, Exhibits A and B. They also held that, in the second appeal, the genuineness of the agreement Exhibit B concurrently found by the lower Courts could not be challenged. But the learned Judges were of opinion that, having regard to the circumstances of suspicion to which they referred in their judgment, the Trial Court had not exercised a proper discretion in raising the presumption of genuineness of the agreement and admitting it in evidence without calling upon the plaintiffs to prove it. But they thought that that conclusion was not sufficient to dispose of the appeal as it would not be proper to overrule the discretion of the Trial Court and reject the document without sending the case back for re-trial and giving the plaintiffs an opportunity of supporting the presumption. This they thought unnecessary, as, in their opinion, the hole near the date was a material alteration made in the document by the plaintiffs, which rendered the document void, so that it could not be used for the enforcement of the right to redeem the property in question. In the result, they allowed the appeal and dismissed the suit with costs. A decree was accordingly drawn up on the 8th March, 1933.

Against this judgment and decree, the plaintiffs 3-5 have appealed to His Majesty in Council. The principal question for determination is whether the holes, assuming that they were made by the plaintiffs as the lower Courts have found, were material alterations rendering the document void for any purpose whatever. As all the Courts below have concurrently held that the document in question is genuine, the finding was not challenged before their Lordships.

The rule relating to the effect of material alterations in a deed made after its execution, by or with the consent of any party thereto, as it prevails in English Courts, can be briefly summarised as follows:—

"If an alteration (by measure, interlineation or otherwise) is made in a material part of a deed after its execution, by or with the consent of any party thereto or person entitled thereunder, but without the consent of the party or parties liable thereunder the deed is thereby made void. The avoidance however is not *ab initio* or so as to nullify any conveyancing effect which the deed has already had; but only operates as from the time of

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such alteration and so as to prevent the person who has made or authorised the alteration and those claiming under him, from putting the deed in suit to enforce, against any party bound thereby who did not consent to the alteration, any obligation, covenant or promise thereby undertaken or made.

A material alteration is one which varies the rights, liabilities, or legal position of the parties ascertained by the deed in its original state or otherwise varies the legal effect of the instrument as originally expressed, or reduces to certainty some provision which was originally unascertained and as such void, or may otherwise prejudice the party bound by the deed as originally executed.

The effect of making such an alteration without the consent of the party bound is exactly the same as that of cancelling the deed. The avoidance of the deed is not retrospective and does not re-vest or re-convey any estate or interest in property which passed under it. And the deed may be put in evidence to prove that such estate or interest so passed or for any other purpose than to maintain an action to enforce some agreement therein contained."*

It was urged before their Lordships that there was no decision of this Board authoritatively laying down whether that rule was applicable to Indian cases and, if so, with any and what modifications. Attention was invited to three decisions of this Board, one in 1861 and the other two in 1864. In the first of these cases *Mussamat Khoob Conwur* v. *Baboo Moodnarain Singh*[1], the rule was applied in a modified form. The question arose in a suit in the nature of an ejectment to recover possession of certain properties and to set aside a *sunnud* or deed under which they were held, on the allegation that the deed had been altered after execution and its purpose entirely changed by the insertion of words of limitation creating hereditary rights. Lord Justice Knight Bruce, delivering the judgment of the Board, treated the alteration as if it affected merely the proof of the document, rendering it more suspicious and doubtful, but held that the party responsible for the alteration could satisfactorily explain the existing state of the document by "corroborative proof, independently of the instrument, strong enough to rebut the presumption which arises against an apparent and presumable falsifier of evidence". In the second case *Ranee Surnomoyee* v. *Maharajah Sutteeschunder Roy Bahadoor*[2] an ancient tenure of land, which was proved *aliunde* to have existed, was sought to be supported by a forged document. The Judicial Committee

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* Halsbury's Laws of England; 2nd Edn. Vol. 10; p. 227, para. 287.

1. (1861) 9 M.I.A. 1.
2. (1864) 10 M.I.A. 123.

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again treated the forgery merely as affecting the proof of the document and observed that, where forged documents are produced to support a case, that fact naturally creates suspicion, but if the Appellate Court has to deal with a just case, though foolishly and wickedly attempted to be supported by false evidence, such circumstances will not prejudice the judgment on the merits, when the case is supported by independent evidence. A similar view was taken in the third case *Sevvaji Vijaya Raghunadha* v. *Chinna Nayana Chetti*[1].

It is clear from these decisions of the Board that the rule of law as stated above was not noticed therein; but that might be due to various reasons. It might be that the rule had not been fully evolved or settled beyond dispute at the date of these decisions. The question now arises whether there is anything, either in the evolution or policy of this rule, making it inapplicable to Indian conditions. There is no doubt that the rule has been gradually evolved as a result of English decisions. It is unnecessary to go into detail, beyond referring to the observations of Sir George Jessel, M. R., in the case of *Suffell* v. *The Bank of England*[2]. In that case, the Master of the Rolls had occasion to examine the policy and foundation of the rule, with a view to determining whether there was anything in its principle or origin requiring its restriction to deeds under seal only or whether there was good reason to extend its scope to all documents in writing (like, for instance, Bank of England Notes). Examining the foundations and development of the rule, the Master of the Rolls said that he took the general law on the subject to be then settled beyond dispute. He observed[3] "The leading case, and which from the time of James I has always been so treated, is *Pigot's* case[4] and whatever may be said of the first resolution in *Pigot's* case, no doubt has ever been raised as to the second resolution, which is this 'that when any deed is altered in a point material by the plaintiff himself, or by any stranger without the privity of the obligee, be it by interlineation, addition, raising, or by drawing of a pen through a line or through the midst of any material word, the deed thereby becomes void'. So that even if a single word which is material is erased, it destroys the instrument. It was next

1. (1864) 10 M.I.A. 151.
2. (1882) L.R. 9 Q.B.D. 555.
3. (1882) L.R. 9 Q.B.D. 555 at 559.
4. (1614) 11 Rep. 26.

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decided that such rule of law which applies to deeds applied to documents not under seal. The case which decided this was the well-known case of *Master* v. *Miller*[1] decided in the year 1791. There Lord Kenyon, who was Lord Chief Justice of the Queen's Bench, held that the rule which applied to instruments under seal applied to documents not under seal, 'because', he said, 'no man shall be permitted to take the chance of committing a fraud without running any risk of losing by the event when it is detected'."

Referring to the policy of the rule, Sir George Jessel observed:[2]

"A man shall not take the chance of committing a fraud and when that fraud is detected, recover on the instrument as it was originally made. In such a case the law intervenes, and says that the deed thus altered no longer continues the same deed and that no person can maintain an action upon it. In reading that and the other cases cited, I observe that it is nowhere said that the deed is void merely because it is the case of a deed, but because it is not the same deed. The deed is nothing more than an instrument or agreement under seal; and the principle of those cases is that any alteration in a material part of any instrument or agreement avoids it, because it thereby ceases to be the same instrument. And this principle is founded on great good sense, because it tends to prevent the party in whose favour it is made from attempting to make any alteration in it. This principle, too, appears to me as applicable to one kind of instrument as to another."

Is there anything in the principle or origin of this rule which makes it inapplicable to conditions prevailing in India? Their Lordships have no difficulty in answering the question in the negative. The rule is based on "great good sense". It is dictated by public policy and is independent of considerations of clime or race. It is consistent with the principles of equity and good conscience which have generally prevailed in India, unless they conflicted with Hindu or Mahommedan law. In their Lordships' opinion, there is no such conflict, and there is no reason why the rule should not be made applicable to India.

Their Lordships are not therefore surprised to find that the rule has in fact been adopted in Indian decisions which are numerous. It is enough to refer to a few, one from each of the important provinces. *Subrahmania Ayyan* v. *Krishna Ayyan*,[3] *Mangal Sen* v. *Shankar Sahai*,[4] *Gogun Chunder Ghose* v.

1. (1791) 100 E.R. 1042: 4 T.R. 320: 1 Sm. L.C. 8th Ed. p. 857.
2. (1882) L.R. 9 Q.B.D. 555 at 561.
3. (1882) I.L.R. 23 Mad. 137.
4. (1899) 9 M.L.J. 368: I.L.R. 25 All. 580.

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Dhuronidhur Mundul[1]. *Namdev Jayram* v. *Swadeshi Vyapari Mandali Ltd.*[2]. Their Lordships are in complete accord with the views of Sir Richard Garth, C.J., where that eminent Judge, dealing with the argument that this rule belonged to the law of England and should not be made applicable to India, observed that he saw no reason why it should not and saw every reason why it should[3].

Applying this rule to the circumstances of this appeal, their Lordships find that the relevant alterations are the following:—(1) A hole above the date of the agreement, 26th March, 1844, occurring at the bottom of Exhibit B. About this alteration, the finding is that the letter "pay" and the figure "5" were taken away by making the hole, with the result that the date, as altered by the hole, could be read as the 26th. (2) A hole after the words "has sold" in the early part of the document. About this, the finding is that, though the paper of the document has been torn at the place, the word "shartia" (meaning conditionally) is sufficiently discernible.

If these alterations were material within the meaning of the rule stated above, there is no doubt that they would have the effect of making the agreement void and the plaintiffs would be unable to rely upon its contents for the purpose of enforcing any obligation, covenant or promise contained in it. The result would be that the covenant by the purchasers, Het Ram and Tula Ram, to release the property in the event of the vendor or his collaterals paying or depositing in a lump sum the amount mentioned in the sale-deed after 25 years, would be unenforceable. The legal position would be as follows:—The document A, the sale-deed, and document B, the agreement to release, being part of the same transaction, would create, as soon as they were executed in 1844, the relationship of mortgagor and mortgagee. This effect, which is the result of the execution of the two documents, would not be nullified by a subsequent alteration of one of them. Such alteration will not cause an avoidance of the altered document *ab initio* so as to nullify its conveyancing effect. It will operate only from the time when the alteration was made, which, according to the finding of the lower Courts, was at some date previous to the

1. (1881) I.L.R. 7 Cal. 616.
2. A.I.R. 1926 Bom. 491.
3. (1881) I.L.R. 7 Cal. 616 at 619.

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filing of the suit in 1928. In consequence of this, a suit for redemption of the property under the said mortgage would lie, but the period of 25 years mentioned in Exhibit B would not be available to the mortgagor. The result will be that the period of 60 years, which would apply to a suit for the redemption of the mortgage of 1844, according to the law operative at that date, will have long elapsed before the date of the present suit and it would be barred by limitation.

To save this consequence, it is necessary for the plaintiffs to rely upon the 25 years' period, at the end of which time would begin to run under the terms of the covenant mentioned in Exhibit B. This the plaintiff can only do if the alterations are not material.

The question therefore arises, are the alterations mentioned above material alterations so as to invalidate Exhibit B? A material alteration has been defined in the rule as one which varies the rights, liabilities or legal position of the parties ascertained by the deed, etc. Do these two alterations fall within that category? Their Lordships are clearly of opinion that they do not. The first alteration relating to the date is of no legal consequence for the reason that the corresponding date, Chait Sudi 6th 1251 Fasli, was left intact. It was therefore possible, by reference to the Indian Calendar, to find out the equivalent Christian date and their Lordships have been assured that, on such reference, the 25th March, 1844, would be found to be the corresponding date. So far, therefore, as this alteration is concerned, it did not cause, in the slightest degree, any variation in the rights and obligations of the parties. The 25th March might as well have been left out without any legal consequence on the effect of the document. As for the second alteration, it is equally immaterial. The finding of the Trial Judge and the first Appellate Court is (which has not been controverted before their Lordships) that, in spite of the torn paper, as observed by the District Judge who apparently knew the language, the word "shartia" is clearly discernible and that word would mean "conditionally" and nothing else. It was not in the plaintiffs' interest to obliterate this word and there is also the additional circumstance that in the translation of this document set out in the High Court judgment, the last two lines mention in clear words that the parties had executed the document "by way of a

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conditional agreement, so that it may serve as evidence and be of use whenever needed." This part of the document has not been tampered with. It is therefore clear that this alteration is not material in the sense of altering the rights or liabilities of the parties or the legal effect of the document.

On this point their Lordships find themselves in greater agreement with the view of the Additional District Judge than with that of the High Court. In many of the rulings mentioned in the High Court judgment, the alteration was material, because it caused a variation of the rights, liabilities or legal position of the parties, as ascertained in the deed in its original state. In some of them, the legal effect of that document, as previously expressed, was varied. For instance, in the case of *Govindasami* v. *Kuppusami*,[1] the date was altered from 11th September, to 25th September. This certainly concerned the period of limitation. This case is also distinguishable on another ground. For, as pointed out in the judgment, the suit in that case was not based on any antecedent transaction for which the instrument was given as security. In the case of *Namdev Jayaram* v. *Swadeshi Vyapari Mandali*,[2] the date May, 1922, was substituted for October, 1920. This had the effect of extending the period of limitation and that affected the rights and liabilities of the parties under the contract. Their Lordships do not understand the Bombay case, as the High Court appears to have done, as laying down that an alteration in date is always material, irrespective of its effect upon the rights, liabilities or legal position of the parties. Similarly, the High Court was in error in relying upon the forging of the seal and signature of the Qazi on the copy of the sale-deed, Exhibit I. This alteration has nothing to do with Exhibit B, which alone had been in the possession of the plaintiffs. Exhibit I had come into the hands of the plaintiffs from the Karinda of the mortgagees, under whom the defendants claimed. In no circumstances could this alteration have any effect in rendering void a totally different document, namely Exhibit B. The High Court appears to have been equally in error in holding that the Trial Judge did not exercise a proper discretion in raising the presumption of the genuineness of Exhibit B and admitting it in evidence without calling on the plaintiffs to prove it. It is

1. (1889) I.L.R. 12 Mad. 239. 2. A.I.R. 1926 Bom. 491.

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difficult to understand the exact significance of this opinion when it is remembered that the High Court agreed with the finding of the two Courts below, that this document was genuine and refused to disturb this finding in second appeal. The Additional District Judge agreed with the Munsif and relied on his own comparison of the signatures appearing on the agreement with other signatures of persons who purported to have signed or attested the agreement. This certainly he was entitled to do. He apparently knew the language well and, as he says in his judgment, had carefully compared the signatures and found that they tallied. In these circumstances, if the Trial Court exercised its discretion under S. 90 and the Appellate Court saw no reason to interfere with it, the High Court should have found it difficult to overrule the discretion and reject the document.

The only remaining point is whether the finding of all the the three Courts below, that the documents read together constitute a mortgage by conditional sale was erroneous. This point, however, was not stressed before their Lordships and it is, besides, in accord with the view expressed by the Board in *Narasingerji Gyanagerji* v. *Panuganti Parthasaradhi.*[1]

The result is that the appeal will be allowed, the decree of the High Court set aside and that of the Trial Court restored, decreeing the plaintiffs' suit with costs throughout. Respondents 1-28 will pay the plaintiffs' costs of this appeal.

Their Lordships will humbly advise His Majesty accordingly.

Solicitor for Appellant: *Hardcastle Sanders & Co.*

Solicitor for Respondent: *Stanley Johnson & Allen.*

R. C. C. *Appeal allowed*

K S.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

Narasareddi v. Ranga Reddi.

Kallam Narasareddi and another .. *Petitioners** (*Petitioners*)

v.

Thummuru Ranga Reddi .. *Respondent* (*Respondent*).

Madras Agriculturists' Relief Act (IV of 1938), S. 8—Scope—Promissory note on 1st July, 1933, in renewal of an earlier one—Payment, and ap-

1. (1924) 47 M.L.J. 809: L.R. 51 I.A. 305: I.L.R. 47 Mad. 729.

* C.R.P. No. 1894 of 1939. 18th December, 1940.

propriations towards interest and principal of renewed note made before 1st October, 1937—If can be re-opened.

A promissory note was executed on 1st July, 1933, for Rs. 391-15-1 in renewal of an earlier promissory note for Rs. 255-15-0. The debtor had paid on 4th September, 1934, Rs. 26-5-2 towards interest and Rs. 110-2-10 towards the principal of the renewed promissory note of 1-7-1933. In a suit on the promissory note filed on 4th September, 1937, for the balance of principal and interest,

Held, that the appropriations made on 4th September, 1934, cannot be undone and on that date the principal of the suit note was reduced to Rs. 281-12-3, (being Rs. 255-15-0 principal originally advanced and Rs. 25-13 3 interest). The principal of the renewed promissory note will under S. 8 (explanation) be Rs. 255-15-0, and interest thereon outstanding on 1st October, 1937, will be cancelled.

Petition under S. 25 of Act IX of 1887 praying that the High Court will be pleased to revise the Order of the Court of the Subordinate Judge of Guntur dated the 31st March, 1939 and made in I.A. No. 783 of 1938, in S.C. No. 189 of 1937.

V. Subramanyam for Petitioners.

K. Kameswara Rao for Respondent.

The Court delivered the following

JUDGMENT.—On 1st July, 1933, the petitioner executed the suit promissory note for Rs. 391-15-1 which was in renewal of an earlier promissory note for Rs. 255-15-0. On 4th September, 1934, the petitioner made a payment of Rs. 26-5-2 towards the interest and Rs. 110-2-10 towards the principal of the suit promissory note. The plaint was filed on 4th September, 1937. On the basis of the Bench decisions, the appropriations made on 4th September, 1934 cannot be undone. The result is that as on this date the principal of the suit note is reduced to Rs. 281-12-3. This principal is made up of Rs. 255-15-0 being the principal originally advanced and Rs. 25-13-3 interest. Under S. 8 (explanation) of Act IV of 1938 the principal of the renewed promissory note will be Rs. 255-15-0 and the interest outstanding on 1st October, 1937, will be cancelled. It is not possible for the defendants to prove either that the appropriation towards the principal of the suit note was really towards that portion of the principal which consisted of the original principal, or that there was a sum in excess of Rs. 25-13-3 and subsequent interest outstanding towards interest as on 1st October, 1937. The decision of the lower Court is correct and the revision petition is dismissed with costs.

K. S. —— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

Nagasundaram Pillai .. *Appellant** (*Petitioner*)

v.

Mathurbootham Aiyar .. *Respondent* (*Respondent*).

Nagasundaram Pillai v. Mathurbootham Aiyar.

Madras Agriculturists' Relief Act (IV of 1938), Ss. 19 and 20—Applications for stay or scaling down—If all co-judgment-debtors should join in application by another.

There is nothing in S. 19 or S. 20 which compels all co-judgment-debtors who have claims as agriculturists to join in an application for stay or for scaling down filed by any other judgment-debtor.

Gaja Gopi Reddi v. *Pulla Rami Reddi*, (1939) 1 M.L.J. 888: I.L.R, (1939) Mad. 530, distinguished.

Appeal against the order of the Court of the Subordinate Judge of Trichinopoly dated 29th November, 1939 and made in E. A. No. 1004 of 1939 in O. S. No. 51 of 1932.

A. V. Narayanaswami Aiyar for Appellant.

K. V. Sesha Aiyangar for Respondent.

The judgment of the Court was delivered by

Wadsworth, J.

Wadsworth, J.—In the light of the subsequent events this appeal is now only of importance so far as the question of costs is concerned. The appellant was the second defendant in a suit on a mortgage. The mortgage was executed by an individual of whom the appellant is one of the heirs. After the decree there were two applications to scale down the decree under S. 19 of the Madras Act IV of 1938, one by the ninth defendant, a stranger, and the other by the fourth defendant who is a co-heir with the appellant, but not a co-parcener. There was a dispute as to whether the appellant was or was not duly served with notice of these applications. For the sake of argument we will assume that he was served. The lower Court has held, quoting the decision in *Gaja Gopi Reddi* v. *Pulla Rami Reddi*,[1] that the appellant cannot move under S. 20 of the Act by reason of his failure to apply for scaling down at the time when the other co-defendants filed applications. It seems to us that this conclusion cannot be supported with reference to the terms of the Act. The decision quoted in *Gaja Gopi Reddi* v. *Pulla Rami Reddi*,[1] relates to quite different

* A.A.O. No. 99 of 1940. 25th November, 1940.

1. (1939) 1 M.L.J. 888: I.L.R. (1939) Mad. 530.

Naga-sundaram Pillai *v.* Mathur-bootham Aiyar. —— Wads-worth, J.

facts, namely, the case of successive applications by members of the same joint family which was the judgment-debtor. There is nothing in S. 19 or S. 20 which compels all co-judgment-debtors who have claims as agriculturists to join in an application for stay or for scaling down filed by any other judgment-debtor. It is quite possible that the case of the appellant may be totally different on the facts and evidence from the cases of the fourth and the ninth defendants. There was, in our opinion, no obligation upon him to file his application as part of the proceedings initiated by his co-defendants. The decision of the lower Court is therefore erroneous.

However since that decision was passed the lower Court has entertained an application by the appellant for scaling down the decree under S. 19 and the decree has been scaled down in his favour. There is therefore no longer any necessity to stay the execution. In the result therefore the appeal is dismissed. But the respondent will pay the costs of the appellant here and in the Court below.

K. S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE LAKSHMANA RAO.

Hussain Khan *alias* Sulaiman Khan and another ... *Appellants* (Accused & his father).*

Hussain Khan *In re.*

Madras Children Act (IV of 1920), Ss. 21 (1) and 26 (1)—Young person charged under S. 326, Indian Penal Code, pleading guilty—Sentence of Rs. 50 fine—Notice under S. 21 (1) of Madras Children Act to father and direction under S. 26 (1) to pay the fine—Father not given opportunity to show that he had not conduced to the commission of offence—Proper procedure.

The first appellant a young person pleaded guilty to a charge under S. 326, Indian Penal Code, and he was sentenced by the Juvenile Court to pay a fine of Rs. 50. The second appellant, the father, was present in obedience to the notice under S. 21 (1) of the Madras Children Act and he was directed to pay the fine under S. 26 (1) of the Act. No opportunity was given to him to show that he had not conduced to the commission of the offence by the appellant nor was there any indication that the offence was due to any neglect of the father.

Held, the order under S. 26 (1) imposing the fine should be set aside and the proper course was to commit the first appellant to the custody of his father on his executing a bond to be responsible for the good behaviour of the son.

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*Crl. Appeal No. 199 of 1940. 1st August, 1940.

Hussain Khan In re.

Appeal against the order of the Juvenile Court, Vepery, Madras, dated 7th February, 1940 and passed in J.C. No. 49 of 1940.

P. A. Krishna Kutti Nair for Appellants.

The Crown Prosecutor for the Crown.

The Court delivered the following

JUDGMENT.—The first appellant, a young person, pleaded guilty to a charge under S. 326, Indian Penal Code and he was sentenced to pay a fine of Rs. 50. The second appellant the father was present in obedience to the notice under S. 21 (1) of the Madras Children Act and he was directed to pay the fine under S. 26 (1) of the Act. But no opportunity was given to him to show that he had not conduced to the commission of the offence by neglecting to exercise due care of the first appellant nor does it appear from the report of the Probation Officer that the offence was due to any neglect of the father. The order under S. 26 (1) of the Madras Children Act is therefore set aside and on the materials on record the proper course was to commit the first appellant to the custody of his father on his executing a bond to be responsible for the good behaviour of the son. The sentence of fine is therefore set aside and the first appellant will be committed to the custody of the second appellant on his executing a bond for Rs. 100 to be responsible for the good behaviour of the first appellant for one year.

K.S. *Order varied.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

Thrikkateeri Ullanoor Manakkal
Vasudeva Nambudiri .. *Petitioner* (Respondent).*

v.

Matanna Thediyil Kayyumma .. *Respondent (Petitioner).*

Vasudeva Nambudiri v. Kayyumma.

Madras Agriculturists' Relief Act (IV of 1938), S. 15—Assignee of a portion of the properties demised under a kanom—If liable to pay the rent due to jenmi and entitled to benefits under S. 15 of Madras Act IV of 1938.

An assignee of a part of the property demised under a kanom is liable by privity of estate to pay a proportionate part of the rent reserved under the lease, so long as he remains assignee, (*Kunhi Sou v. Mulloli Chathu*),

*C. R. P. No. 854 of 1939. 16th September, 1940.

I.L.R. 38 Mad. 86 followed) and by virtue of S. 41 of the Malabar Tenancy Act the *jenmi* is entitled to recover the entire rent reserved under the lease from such assignee. The assignee of part of the demised property is therefore entitled to claim the benefit of S. 15 of Act IV of 1938.

Vasudeva Nambudiri v. Kayyumma.

Petition under S. 115 of Act V of 1908 praying that the High Court will be pleased to revise the order of the Court of the District Munsif of Walluvanad dated 24th October 1938 and made in O. P. No. 151 of 1938.

P. Govinda Menon for Petitioners.

D. A. Krishna Variar for Respondent.

The Judgment of the Court was delivered by

Patanjali Sastri, J.

Patanjali Sastri, J.—The main question arising for determination in this revision petition is whether an assignee of part of the properties demised on *kanom* is entitled to the benefit of S. 15 of the Madras Agriculturists' Relief Act in respect of the arrears of *michavaram* due to the *jenmi*. The lower Court has held that he is, and the petitioner who is the *jenmi* contests the validity of that conclusion.

The facts are briefly these. The petitioner demised five items of land on *kanom* to one Haji by Ex. A dated 11th December, 1907 for a sum of Rs. 136-11-5. Under this deed, the *michavaram* payable by the kanomdar was fixed at 50 paras and 6 narayams of paddy and one bunch of bananas worth eight annas. There was a partition in Haji's family in 1925, and three out of the five items comprised in the *kanom* were allotted to his son Koya subject to the payment of 50 paras and 4 annas which is practically the entire *michavaram* due to the *jenmi*. The respondent became entitled by assignment under Ex. B dated 13th March, 1937 to the interests of Koya in the three items aforesaid, and although a sum of Rs. 125 out of the consideration for the assignment was reserved with him for payment to the petitioner as arrears of *michavaram* due till then, he applied for relief under S. 15 of the Act making the prescribed deposit.

We have already held in C. R. P. No. 611 of 1939 that the assignee of the entire interest of a lessee in the property demised is entitled to claim the benefit of S. 15, but it is argued that as the respondent is an assignee of some only of the items demised in *kanom* and so not bound, even by privity of estate, to pay rent as such to the landlord, he cannot claim such benefit. It is however clear that under the general law which has been

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applied to leases in Malabar (See *Kunhi Sou* v. *Mulloli Chathu*[1]) an assignee of a part of the demised property is liable by privity of estate to pay a proportionate part of the rent reserved under the lease, so long as he remains assignee: see Leake on Contracts (8th edition page 960); and *United Dairies Ltd.* v. *Public Trustee*[2]. Though the respondent is liable on this basis to pay only proportionate *michavaram* to the *jenmi*, S. 41 of the Malabar Tenancy Act provides that:

> " Arrears of michavaram or rent due to the landlord together with interest, if any, payable on the same shall be a charge on the interest of the person from whom they are due in the holding in respect of which they are due as at the time of the creation of such interest."

Thus not only is the respondent under a liability to pay rent, founded upon privity of estate with the *jenmi*, but the latter is entitled, by virtue of the provision referred to above, to recover the entire rent reserved under the lease from the properties assigned under Ex. B. The respondent is thus a person by whom rent is payable to a jenmi, and, there being no dispute that he is an agriculturist as defined in the Act, is entitled to claim the benefit of S. 15.

It was also contended for the petitioner that inasmuch as a sum of Rs. 125 out of the consideration for the assignment was expressly reserved with the respondent for payment to the petitioner, the respondent could not claim to have such arrears declared discharged. This contention must be rejected as the respondent's agreement with his assignor to pay the sum reserved with him to the petitioner can have no bearing upon his statutory right to have such arrears wiped out under S. 15 of the Act. It may be that the respondent, in a question with his assignor, will be bound to return to the latter the sum which he undertook to pay but did not in fact have to pay. That question does not arise here and we express no opinion upon it.

The revision petition fails and is dismissed with costs,

K. S. *Petition dismissed.*

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1. (1912) 23 M.L.J. 695: I.L R. 38 Mad. 86. 2. (1923) 1 K.B. 469

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

Pachigolla Satyanarayanamurthi ... *Appellant* (Respondent—Petitioner—Plaintiff)*

v.

Satti Gangisetti ... *Respondent (Petitioner—1st Defendant.)*

Satyanarayanamurthy. *v.* Gangisetti

Madras Agriculturists' Relief Act (IV of 1938), S. 19—Final decree of 19th March, 1937, on mortgage—Private sale of some items of hypotheca on 9th October, 1937—Vendee directed to pay decree-holder—Balance remaining unpaid by vendee, a non-agriculturist—Debt scaled down to zero by operation of damdupat *rule—Vendee if can be impleaded and made liable for the debt as a non-agriculturist.*

After final decree on a mortgage some items of the hypotheca were sold on 9th October, 1937 and the vendee was directed to pay the mortgagee decree-holder. A portion of the purchase price remained unpaid when the debtor applied for entering up satisfaction of the decree, (more than twice the amount of the principal and costs having been paid towards the decree). The creditor sought to implead the vendee, a non-agriculturist, and make him liable for the balance due under the decree.

Held, (i) that the vendee cannot be impleaded as he has no separate rights to agitate in the execution of the decree; (ii) that he was not a party to the decree and scaling down cannot be restricted to the judgment-debtor agriculturist's interest in the property in his possession inasmuch as that will result in splitting up of the decree against the only party to the decree, and (iii) that the principle in *Ramier* v. *Srinivasiah,* (1940) 2 M.L.J. 872 (C. R. P. No. 1574 of 1938) will not apply in that the vendee was not a party to the suit.

Appeals against the orders of the Court of the Subordinate Judge of Amalapuram dated 10th October, 1938 and passed in C. M. P. No. 286 of 1938 and E. A. No. 308 of 1938 in O. S. No. 30 of 1935 etc.

P. Satyanarayana Rao and *M. Balakrishnamurthi* for Appellant.

V. Viyyanna for Respondent.

The judgment of the Court was delivered by

Wadsworth, J.

Wadsworth, J.—The first two cases are alternative one to the other, being an appeal and a revision against an order scaling down a decree under S. 19 of Madras Act IV of 1938. C.M.A. No. 119 of 1939 arises out of the same decree and is preferred

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*C.M.A. Nos. 118 and 119 of 1939.
and
C.R.P. No. 511 of 1939.

17th October, 1940.

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Wadsworth, J.

against an order declining to implead the purchaser as a party to the final decree.

The facts are simple. In 1936, there was a preliminary decree on a mortgage of 1930. On 3rd February, 1937 a portion of the hypotheca was sold and the sale proceeds were paid to the mortgagee who released that part of the hypotheca. On 19th March, 1937, there was a final decree for sale of the balance of hypotheca. On 9th October, 1937 there was a further private sale by the mortgagor comprising the greater portion of his remaining interest and the purchaser paid Rs. 25,000 out of the sale price to the mortgagee, the balance of the sale price being retained for future payment. In this state of affairs, when the mortgagor retained his interest in only a few items of the hypotheca, he filed an application to scale down the decree under S. 19 of Act IV which had recently come into force. By way of counterblast to this application, the decree-holder filed an application to implead the purchaser as a party to the final decree and he opposed the scaling down application on the ground that it should not enure to the benefit of the purchaser who was not an agriculturist. The lower Court repelled his contentions and scaled down the decree at the instance of the mortgagor and declined to implead the purchaser *pendente lite*.

The argument before us on behalf of the decree-holder who is the appellant here, is briefly this:—When Act IV of 1938 came into force, there was already a liability imposed on the purchaser by reason of his purchase to satisfy this decree by the sale of those items which had been transferred to him. Though the mortgagor was still liable for the decree, it is argued that he was entitled to have the decree scaled down only to the extent of his subsisting interest in the hypotheca as it stood when the Act came into force and we are asked to amend this decree so as to provide for the sale of those items transferred to the purchaser for the full amount of the decree as originally passed and for the sale of those items retained by the mortgagor only for the amount of the decree as scaled down. We have held in C.R.P. No. 1574 of 1938 that when there is a decree against two persons one of whom is an agriculturist and the other is not, the decree may be scaled down as against the agriculturist judgment-debtor and left intact as against the non-agriculturist judgment-debtor, suitable modifications being

made in the form of the decree. But what we are now asked to do is to alter this decree so as, in effect, to give one decree against the only judgment-debtor and another decree against a person who was not a party to the suit and against whom no decree has been passed. We are unable to see how S. 19 of Act IV of 1938 empowers us to proceed in this manner. It is true that we have held in C. R. P. No. 1734 of 1939 *Palani Goundan* v. *Peria Goundan*[1] that an assignee from a judgment-debtor may if he is an agriculturist claim the benefits of S. 19. But this decision is no warranty for holding that when the sole judgment-debtor on the record is an agriculturist, the scaling down of the decree should be restricted so as not to affect any portion of the property covered by the decree which has come into the hands of a non-agriculturist after the suit. We are of opinion that the decision of the lower Court on the main question is correct and see no point in impleading the purchaser who has no separate rights to agitate in the execution of this decree.

The appellant has also raised the question whether Act IV of 1938 is *ultra vires* so far as it affects negotiable instruments. This is a matter which only arises in the process of scaling down the decree and in respect of that contention we are governed by the decision of the Full Bench in *Nagaratnam* v. *Seshayya.*[2]

The appeals and the revision petition are therefore dismissed with costs (one set in each of the two civil miscellaneous appeals).

We give the necessary certificate under S. 205 of the Government of India Act that the case involves a substantial question of law as to the interpretation of the Government of India Act.

K. S. *Appeals and petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KING.

K. G. Govindarajulu Naidu .. *Petitioner** (*Defendant*)

v.

M. S. Gopalaswamy Chetty and another .. *Respondents* (*Plaintiffs*).

1. (1940) 2 M.L.J. 887.
2. I.L.R. 1939 Mad. 151: (1939) 1 M.L.J. 272 (F.B.).

* C. R. P. Nos. 722 and 723 of 1937. 13th August, 1940.

Govindarajulu Naidu v. Gopalaswamy Chetty.

Transfer of Property Act (IV of 1882), S. 76—Usufructuary mortgagee from lessee—If can be proceeded against by the landlord for rent or jodi due on the property.

S. 76 of the Transfer of Property Act, deals only with the relative rights and duties of the mortgagor and mortgagee and cannot confer on a landlord the right to proceed directly against a usufructuary mortgagee from his lessee for rent or jodi due to him.

Petitions under S. 25 of Act IX of 1887 praying that the High Court will be pleased to revise the decrees of the Court of the District Munsif of Krishnagiri in S. C. S. Nos. 1 and 9 of 1937 respectively.

C. S. Venkatachari and *D. Ramaswami Aiyangar* for Petitioners.

Alladi Ramaswami Aiyar for Respondents.

The Court delivered the following

JUDGMENT.—These petitions arise out of Small Cause suits filed by a landlord for rent or jodi due to him for faslis 1343, 1344 and 1345. He has however not sued his original lessee but has sued the petitioner who is a usufructuary mortgagee, from that lessee. The District Munsif has given him a decree on the ground that the provisions of S. 76 (c) of the Transfer of Property Act lay it down that a usufructuary mortgagee in possession of the mortgaged property is bound to pay the land revenue or similar public charges due on that property. This decree has been challenged in revision. It is argued that S. 76 of the Transfer of Property Act deals only with the relative rights and duties of the mortgagor and mortgagee and cannot possibly confer upon a third party to the mortgage the right of proceeding directly against the mortgagee for the recovery of rent. This objection seems to me unanswerable and is supported by the authority of *Sachindra Mohan Ghose* v. *Commissioner for the Port of Calcutta.*[1]

The respondent, however, although he does not seriously attempt to support the argument adopted by the learned District Munsif contends before me that he is entitled to proceed against the petitioner on the ground that he has recognised the transfer of the lease by way of the mortgage and has accepted rent from the petitioner for five faslis before the faslis with which these suits deal. I have analysed such evidence as is available and I find that it is true as a matter of fact that the defendant has paid the rent for faslis 1338 to 1342. There is nothing

1. (1937) 66 C.L.J. 10.

however in the documents filed in the case to prove that he paid this rent as the assignee of the mortgagor or in substitution for the mortgagor's liability to pay and that he did not pay it as agent of the mortgagor. On the evidence put forward in the case therefore there is no material for any positive finding as to the capacity in which the petitioner paid. So far as the plaint is concerned it is quite clear that the claim was not made upon this principle of law at all. The only ground upon which the claim was made was that the defendant as mortgagee was in actual use and occupation of the land. In his written statement the defendant pleaded that there was no contract between him and the plaintiff and further asserted that his mortgagor had actually sold the equity of redemption to one Venkatasami Naidu and that it was Venkatasami Naidu from whom the plaintiff should seek payment of the rent. I understand that the plaintiff thereupon attempted to implead Venkatasami Naidu but that the Court refused to allow the application which was belated. This state of the pleadings will amply show that there was no obligation at all upon the defendant to explain the capacity in which he actually paid the rent. It is now argued finally on behalf of the respondent that I should call for a finding on this question, namely, whether the defendant paid the rent during the preceding five faslis as agent for the mortgagor or in substitution for him. In view of the fact that the plaintiff did not base his claim upon the previous payment and did not even refer in his plaint to the fact of the previous payment by the defendant, I see no reason why I should order a remand to establish a matter which was clearly outside the scope of the suits as laid and as defended.

Govindarajulu Naidu v. Gopalaswamy Chetty.

The result is that the decrees of the learned District Munsif cannot be upheld and must be set aside. These petitions are accordingly allowed and the plaintiff's suits dismissed with costs throughout.

K. S. *Petitions allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE BURN AND MR. JUSTICE MOCKETT.

The Public Prosecutor ... *Appellant**

v.

Munigan *alias* Munisami .. *Respondent (2nd accused, prisoner).*

Public Prosecutor v. Munigan.

*Cr. Appeals Nos. 574 and 657 of 1940. 29th October, 1940.

Public Prosecutor *v.* Munigan.

Criminal Trial—Statements made by accused—Absence of voluntary character—Persistent questioning by Police during custody—Answers whether can be taken into account against accused—Madras Police Standing Orders O. 583—Effect.

O. 583 of the Madras Police Standing Orders states quite clearly that once an accused person has been arrested, the Police are strictly forbidden to interrogate him or press him to make a statement. Where in a case of murder the accused was interrogated once when he was in the custody of the jail authorities and twice when he was in the custody of the police and it appeared that he was pressed to give the answers which he did relating to the crime.

Held, that the statements made by the accused were not voluntary and the Court could not attach any importance to them.

Kataru Chinna Papiah v. *Emperor*, 1939 M.W.N. 174, and *Emperor* v. *Taduturu Pohigadu*, 1939 M.W.N. 133, referred to.

Appeal under S. 417 of the Code of Criminal Procedure, 1898, to set aside the order of acquittal of the aforesaid respondent (second accused) by the Sessions Judge of North Arcot in S. C. No. 18 of 1940 on his file for an offence under S. 302, Indian Penal Code and to convict the said accused for the said offence and appeal against the conviction and sentence passed by the Sessions Judge of the Court of Session of the North Arcot Division in Case No. 18 of the Calendar for 1940, for an offence under S. 201 (1) Indian Penal Code.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

C.K. Venkatanarasimham for Accused.

The judgment of the Court was delivered by

Mockett, J.

Mockett, J.—In this case the Public Prosecutor on behalf of the Provincial Government has appealed against the acquittal on a charge of murder of one Munigan *alias* Munisami, who was the second accused in S. C. No. 18 of 1940 tried by the learned Sessions Judge of North Arcot Division at Vellore. This accused was charged with another, one Chinnasami *alias* Chenga Reddi, with the murder on the 9th of February 1940 of a woman, one Thayarammal, near the village of Kainoor. There is no question whatever that Thayarammal was murdered. Her body was found on the morning of the 10th of February, and, according to P. W. 1, the doctor, there were three external injuries, wounds on it, and it is obvious that great violence had been used that could have been caused by M. O. 1, a bill-hook which is so commonly in evidence in these cases. According to the doctor, the death of Thayarammal might have occurred at about 2-30 in the morning on the 10th of February, which was

Public Prosecutor v. Munigan.

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a Saturday. Before the learned Sessions Judge the first and the second accused were acquitted of murder, but the second accused has been convicted under S. 201 of the Indian Penal Code and has been sentenced to rigorous imprisonment for five years.

Thayarammal, the deceased woman, had been kept for sometime by the first accused and the witness Munisami Reddi (P. W. 8). There is said to be a motive at the back of this murder, namely, that the second accused had been on intimate terms with Thayarammal's sister Salammal (P. W. 7) and it was suggested in evidence that the deceased was attempting to arrange the marriage of Salammal to the brother of P. W. 14. Indeed the marriage was said to have been fixed for the 11th of February. This action of the deceased is said to have been displeasing to the second accused and to have influenced him in taking the life of Thayarammal. It was alleged at the trial too that the motive which was supposed to have influenced the first accused was that the first accused was endeavouring to persuade the deceased to discard P. W. 8 in his favour and that the deceased was not willing to do so. It is enough to summarise the alleged motive in that way. It rested largely on the evidence of P.Ws. 4, 5 and 7, and a great deal of it unquestionably was derived from statements said to have been made by the deceased woman. There are a number of statements attributed to the deceased woman which have been admitted in evidence which were wholly inadmissible. We would invite the learned Sessions Judge's attention to a recent decision of the Judicial Committee in *Narayanaswami* v. *King Emperor*[1]. In this case Lord Atkin explained the provisions of S. 32 as applicable to murder cases and after that authority there should be little reason for the burdening of the record with statements of persons who subsequently died, which are totally inadmissible, as is unhappily frequently the case. The evidence against the second accused is almost entirely derived from the statements made by himself accompanied by the fact, the undoubted fact, that he was on that evening in the company of the deceased woman. It appears that on the night of the 9th, the woman, Thayarammal, who was living in the house of P. W. 4, went to lie down and the next morning she was found to be missing. It was supposed she had gone to the fields to work, but no trace of her could be found and so enquiries were set on foot and, on February the 10th,

1. (1939) 1 M.L.J. 756.

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P. W. 61, seeing a crowd, went to it and there saw the body of the deceased woman. She still had some of her jewellery upon her, but one article of jewellery, a pair of kammals marked M. O. 2 in this case, was missing. The course of events afterwards was as follows: P.W. 4 made a report, which is the first information report in this case and which is marked Ex. D, and it is interesting to note in that report that P.W. 4 supposes that the likely criminals were the first accused and P.W. 8. On the 11th February the first accused was arrested and on the 12th the second accused was arrested. The second accused was remanded to the Sub-Jail at Arkonam and remained there until the 17th, on which day the Circle Inspector (P. W. 19), after obtaining permission of the Sub-Magistrate questioned him in jail. It is quite obvious that he made a statement which the Circle Inspector wished to use under the provisions of S. 27 of the Evidence Act. That is evident because an application was made to the Sub-Divisional Magistrate at Ranipet to have the accused transferred to police custody. The requisition on which that order was made is Ex. H and the order thereon is Ex. H-1. In it, the Circle Inspector says:

"I interviewed Munigadu *alias* Muniswami in the Arkonam Sub-Jail and he promises to show the place where he had kept the kammals in question."

But it must be remembered that in his evidence the Inspector tells us that he had been "enquiring him", which presumably means questioning him. The accused was taken in charge by the Inspector and was again questioned in the Sub-Jail premises, outside his cell, panchayatdars having been introduced into the jail for the purpose of hearing what he was going to say. One of them is Varadarajulu Naidu who gave evidence in this case as P.W. 20. According to the Inspector, the second accused then stated that the kammals worn by the deceased Thayarammal had been handed over to him by one Valliammal and that he secreted them by the side of his house and would show the place and make recovery of the jewels; and the second accused also said that the kammals had been removed from the ears of the deceased and handed over to him immediately after Thayarammal was murdered. This statement was given in evidence in that form by the Inspector, but it was actually reduced to writing and signed by the Inspector and mediators and it is Ex. J. in this case. In it the second accused made a long statement of which

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the learned Sessions Judge has admitted the following. It begins in the middle of a sentence with the words "Cut Thayarammal's neck". Who it was that cut we are not allowed to know.

"He cut with knife. Valliammal removed the kammal and gave it to me. I have kept the said kammal by the side of my house. I shall now show that spot. The said spot is in Kainoor. If I am taken, I shall take out and give the said kammal."

The accused did produce the kammal from a cattle shed by the side of his house in Kainoor village. But that was not all. According to Ex. J-3 and the evidence of the Circle Inspector, after the property was taken out, the accused was further questioned about the knife with which Thayarammal was cut and in reply to that the accused said that the knife with which Thayarammal was cut was the knife which his father Thangi Reddi had brought that day from Thangavelu Mudaliar of Kainoor for cutting fibre, that after cutting Thayarammal he kept the said knife in his house and that his younger sister Ayammal took away the said knife and gave it in the house of the said Mudaliar; and he showed the house of the Mudaliar. The procedure adopted by the police in this case is, in our opinion, to be condemned. It appears to be in breach of the Standing Orders of the Madras Police. O. 583 (Madras Police Standing Orders) states quite clearly that, once an accused person has been arrested, the Police are strictly forbidden to interrogate him or press him to make a statement. But the Circle Inspector's own admission is that the accused was interrogated more than once; he was apparently interrogated not less than three times, once when he was in the custody of the jail authorities, and twice when he was in the custody of the police. We are furthermore satisfied that he was pressed to give these answers although P. W. 19, the Inspector, says that he made the answer about the bill-hook immediately on being questioned and without hesitation. P. W. 20, who is of sufficient respectability to be summoned to be present at the questioning of prisoners, stated that the second accused was hesitating for about ten minutes before he replied to the Circle Inspector about the knife. This aspect of the case appears to have been wholly overlooked in the lower Court. This Court has on many occasions expressed its view with regard to the questioning of persons in custody. Naturally, persistent questioning may negative the impression that statements are voluntary. There

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are two decisions of this Court reported in *Kataru Chinna Papiah* v. *Emperor*[1], and *Emperor* v. *Taduturu*[2], which contain expressions of opinion by two different Benches on this aspect. It would be extremely dangerous to attach any importance to statements made in these circumstances. There is however the fact that the second accused produced M. O. 2 from the shed of his house and there is the further fact that in consequence of a statement made by him an aruval was produced. There was however no blood upon the aruval detectable. There remains the statement Ex. S which the accused made at the Magistrate's Court and his statement at the Sessions Court. In Ex. S the accused said in answer to a long question put to him by the Magistrate which was really a summary of the facts alleged against him, "I did not know that Salammal was going to be married. The first accused asked me to bring Thayarammal for the bioscope. I and the first accused are very friendly. Some enmity there is between P. W. 9 and the first accused. One night the first accused and P.W. 9 quarrelled. Accused 1 told Thayar "I told you that you should not talk to P. W. 9. Why do you talk to him?" and forbade her doing so. On the night of the murder, accused 1 said to me "Bring Thayarammal. We shall go to the bioscope at Arkonam." Myself, accused 1 and Thayar used to come to the bioscope. That day near the field of Adinarayana Reddi, Accused 1 asked me to hold Thayarammal's hand or arm. Accused 1 cut Thayar. I then went home. Accused 1 went away to the field to the place where sheaves lay." After the statement was read out to him, the accused added, "Next day, at day-break on the day on which the police brought Accused 1, Accused 1 gave M. O. 1 to me asking me to 'keep it' ". It was contended that, on that statement, the Court was entitled to draw the inference that this man was responsible for the murder of the deceased and cases were cited to the lower Court to establish the principle on which such an inference could be made. Those cases were of the class where a single man is seen in the company of a person who is at or about that time clearly murdered and who in addition is found soon after in possession of jewels taken from the body of the deceased and who further gives no explanation which is reconcilable with the truth. This is not such a case.

1. 1939 M.W.N. 174 (Crl.). 2. 1939 M.W.N. 133 (Crl.).

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It must be remembered that, putting it at its highest, the only evidence against the accused was that of P. Ws. 10 and 11 who said that they saw him in the deceased's company at 9 and 10 P.M. respectively on the night of the 9th February. But there is the accused's own statement admitting his presence with the deceased but giving an explanation as to why he was in her company, namely, that he had been asked by the first accused to fetch her. He furthermore does not admit his guilt. The most he admits is that the first accused asked him to hold Thayar's hand. He has not said that at that time the first accused had an aruval in his hand or had said or done anything to indicate that he contemplated violence against Thayarammal. That such a statement may arouse suspicion against the second accused cannot be doubted; but it is not such a statement as to raise the irresistible presumption of guilt which may arise in other cases on totally different facts. It is possible that there may be some truth underlying the accused's story. It is far from certain that he is guilty of murder. On these facts there is necessarily that element of doubt to which an accused person is always entitled. So far as the appeal against the acquittal is concerned it must, in our view, be dismissed.

But the accused is also an appellant in Crl. App. No. 657 of 1940 against his conviction under S. 201 of the Indian Penal Code. The facts which we have set out are sufficient for the purpose of considering this appeal also. Taking the accused's own statement and putting it as much in his own favour as one can as we have done for the purpose of the appeal of the Crown, after being present at a murder, he took from the man who, according to him committed the murder, a kammal which was unquestionably the property of the deceased and had hid it, and we know that he produced it. It cannot possibly be said that on these facts the Court was not entitled to take the view that, when he hid this article of jewellery, he hid it with the intention of screening the offender, whoever he was, from legal punishment. We think therefore there is no substance in the appeal by the second accused and that appeal is also dismissed.

B.V.V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PANDRANG RAO.

P.P. Ar. Rm. Sp. Ramanathan Chettiar by mother and guardian Meenakshi Achi .. *Petitioner** (*4th Defendant*)

v.

A. R. R. M. Somasundaram Chettiar .. *Respondent* (*Plaintiff*).

Ramanathan Chettiar. *v.* Somasundaram Chettiar.

Civil Procedure Code (*V of* 1908), *O.* 32, *r.* 15—*Application after final decree for appointment of guardian* ad litem *of mentally infirm defendant—Application necessitated by need to apply under S.* 19 *of Madras Act IV of* 1938—*Necessity to hold judicial inquiry and allow evidence to be adduced.*

The petitioner, the mother of the judgment-debtor who was mentally infirm, applied under O. 32, r. 15 Civil Procedure Code, for the appointment of a guardian *ad litem* to apply for scaling down the decree debt. The petitioner was desirous of adducing evidence especially in the shape of a doctor's certificate, but no opportunity was given for this purpose as the lower Court was of opinion that the production of the medical certificate would not advance the case any further. In revision,

Held, that as the effect of the dismissal of the application would be to prevent the application of the provisions of Madras Act IV of 1938 to a case to which they may apply, it was incumbent on the Court to hold a judicial inquiry and allow the parties to adduce evidence.

Petition under S. 115 of Act V of 1908 and S. 224 of the Government of India Act praying that the High Court will be pleased to revise the order of the Court of the Subordinate Judge of Devakottai dated 31st October, 1939 and made in T. A. No. 706 of 1939 in C.M.P. No. 2749 of 1939 in A. S. No. 237 of 1934 on the file of the High Court, Madras.

V. Ramaswami Aiyar for Petitioner.

A. V. Viswanatha Sastri for Respondent.

The Court delivered the following

JUDGMENT.—This is a petition to revise the order of the Subordinate Judge of Devakottai dated 31st October, 1939, dismissing an application made under O. 32, r. 15, Civil Procedure Code, for the appointment of a guardian *ad litem* of the fourth defendant in O. S. No. 208 of 1932 on his file. The application was made necessary by reason of the fact that after the suit had been finally disposed of by this Court in appeal, an application was presented on behalf of the fourth defendant, who is a major, by his mother as guardian *ad litem* to apply

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* C. R. P. No. 2378 of 1939 and C. M. P. No. 1048 of 1940. 27th September, 1940.

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the provisions of the Madras Agriculturists' Relief Act (IV of 1938) to the decree passed in the appeal. That petition to apply the provisions of the Madras Agriculturists' Relief Act as well as this petition for the appointment of the mother as the guardian *ad litem* were both remitted to the lower court for disposal. Reliance had been placed in support of the application for appointment of a guardian *ad litem* on the provisions of O. 32, r. 15, Civil Procedure Code. The case put forward before the Court below was that the fourth defendant, though, a major, was mentally infirm and unable to manage his affairs. The lower court instead of holding a regular judicial inquiry which is contemplated by r. 15 appears to have thought that it was sufficient to rely on the previous history of the litigation and on its own opinion formed after looking at the fourth defendant and eliciting answers to some questions. It would appear that the petitioner was desirous of adducing evidence especially in the shape of a doctor's certificate, but no opportunity was given for this purpose as the lower court was of opinion that the production of the medical certificate would not advance the case any further, a view which it is difficult to justify in the circumstances. There is no doubt that in a matter of this kind where the consequence of a dismissal of the petition would be to prevent the application of the provisions of the Madras Agriculturists' Relief Act to a case to which they may apply, it was incumbent on the court to hold a regular judicial inquiry and desirable to invite the parties to adduce proper evidence even if the parties were somewhat indifferent, for, otherwise justice could not be done. It seems as if the petitioner must have been under the impression that the date on which the petition was finally disposed of was not the date on which evidence was to be taken but that the fourth defendant was merely to be produced and that some other date would be fixed for inquiry. In any case I have no doubt that the disposal of this petition has been very unsatisfactory and that serious injustice might be done if things are allowed to remain in the present state. There has been no inquiry of the kind contemplated by law in this matter and the order made by the Subordinate Judge without proper inquiry must be deemed to be an order passed in the irregular exercise of his jurisdiction. The learned Judge says that it may be that the fourth defendant is not very intelligent or a little weak in intellect.

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Then he goes on to observe that the fact that he is a man of weak intelligence is not a sufficient ground to hold that he is an insane man or to appoint a guardian-*ad-litem* for him. This proposition is one which cannot be accepted as correct. It depends certainly on the degree of weakness of intelligence. If the weakness is very great and such as to make the fourth defendant incapable of protecting his interest when being sued or when suing he would certainly come within the protection given to such persons by O. 32, r. 15. Moreover, the lower court appears to have relied too much on the fact that the fourth defendant appeared in Court when called upon, a perfectly natural proceeding when it is remembered that he was asked to be present and he was brought by his own mother to Court. Then again, it is said that the fourth defendant was able to give coherent answers after understanding the questions put to him. In the absence of the questions and the answers it is impossible for a Court of revision to decide whether the conclusion come to on this particular aspect of the case is justifiable. In any case it seems to me that the interests of justice require that a matter of this importance should not be decided in this unsatisfactory and almost unjudicial fashion. The order of the Subordinate Judge is therefore set aside and the petition is remanded to the Court below for fresh disposal according to law after giving both parties an opportunity to adduce evidence. The costs of this petition will abide the event and should be provided for in the revised order of the lower court.

The application (C. M. P. No. 1048 of 1940) to let in additional evidence in revision is dismissed, as an opportunity has now been given to adduce evidence in the lower court.

K.S. *Petition remanded.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE BURN AND MR. JUSTICE MOCKETT.

Muddamsetti Subba Rao and another .. *Prisoners* (Accused) Nos. 2 and 3.*

Subba Rao *In re.*

Indian Penal Code (XLV of 1860), Ss. 147, 148 and 149—Rioting resulting in death of one and severe hurt to others—Conviction of accused under Ss. 148 and 149 Penal Code—Whether sustainable.

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*R. T. No. 166 of 1940 and Crl. Apps. Nos. 660, 661 and 659 of 1940. 3rd December, 1940.

Subba Rao. *In re.*

The only offence that S. 148 Indian Penal Code describes or refers to is the offence of rioting and provision is made for enhanced punishment if the rioter at the time of rioting is armed with a deadly weapon. S. 149 is intended to lay upon all the members of an unlawful assembly responsibility for any offence, other than the offence of rioting, committed by any member of the unlawful assembly in prosecution of the common object. S. 149 can hardly have been intended to make rioters constructively guilty of the offence of rioting.

Where there was a riot at a place and one *V* was fatally wounded and another severely injured and the first three accused were alleged to have been armed with weapons, and the trial Judge charged all the accused under S. 148 read with S. 149, and separately charged accused 1 and 2 with murder of *V*, on the question whether the convictions were proper,

Held, that the convictions should be altered under the first charge to a conviction under S. 148 for accused 1 to 3 and under S. 147 for the rest of the accused,

Sabir v. *Queen Empress*, (1894) I.L.R. 23 Cal. 276, *Emperor* v. *Nageshwar*, (1906) I.L.R. 28 All. 404, *Emperor* v. *Dulli*, (1924) I.L.R. 47 All. 59, *Emperor* v. *Ali Mirza*, (1923) I.L.R. 51 Cal. 265 and *Arunachala Thevan* v. *Emperor*, (1911) 22 M.L.J. 186 referred to.

Trial referred by the Court of Session of the Kistna Division for confirmation of the sentences of death passed upon the said prisoners on 6th September, 1940 in Case No. 19 of the Calendar for 1940 and Appeals by the said prisoners (2nd and 3rd accused) against the said sentences of death and sentences of imprisonment passed upon them in the said case.

K. S. Jayarama Aiyar and *P. Suryanarayana* for the Accused.

The Public Prosecutor for the Crown.

The judgment of the Court was delivered by

Burn, J.

Burn, J.—These eight appellants were tried jointly by the learned Sessions Judge of Kistna on charges arising out of offences committed at about 9 p.m. on the 19th of February last in Masulipatam town at a place called Javarpet Junction. There was a disturbance at that place and time in the course of which one N. Venkataswami was fatally wounded, another man named Viraswami (P.W. 7) was very seriously injured, a police-constable named Antony (P.W. 4) was slightly injured and one Chandramouli (P.W. 8) was severely wounded in the foot. The first three accused were alleged to have been armed with spears and the other five with sticks. On these facts the learned Sessions Judge framed charges against all the accused under S. 148 read with S. 149 of the Indian Penal Code; he

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separately charged the second and the third accused with the murder of Venkataswami. The first accused was separately charged with voluntarily causing grievous hurt with a deadly weapon to Viraswami, and the third accused was charged with voluntarily causing hurt to deter a public servant from his duty —S. 332. Indian Penal Code. Accused 5, 6, 7 and 8 were charged with causing simple hurt to Chandramouli (P. W. 8) and accused 2 and 3 were charged with causing simple hurt with a dangerous weapon to Viraswami (P.W. 7). The learned Sessions Judge, disagreeing with the assessors (who perversely said that none of the accused was guilty of anything), held that all the accused were guilty of all the offences with which they had been charged. He sentenced the second and the third accused to death for the murder of Venkataswami, the first accused to five years' rigorous imprisonment for the offence under S. 326, all the accused to two years' rigorous imprisonment for rioting armed with deadly weapons, the third accused to two years' rigorous imprisonment for an offence under S. 332, the second and the third accused to two years' rigorous imprisonment for an offence under S. 324 and accused 5, 6, 7 and 8 to rigorous imprisonment for six months for the offence of simple hurt. Hence these appeals. Mr. Jayarama Aiyar who has appeared for the appellants has conceded that there is no possibility of doubting the occurence or the commission of the various offences with which the accused were charged. Accused 1, 3, 4 and 8 admitted their presence at the scene of offence and at the time stated by the prosecution witnesses. Accused 2 and 7 pleaded *alibi*, and accused 5 and 6 merely denied that they knew anything about the occurrence, and said they had been impleaded on account of enmity. Accused 2 and 7 adduced evidence in support of their pleas of *alibi*. The seventh accused examined three witnesses, D.Ws. 3, 4 and 7, to prove that he was at Godugupet, another part of Masulipatam. The learned Counsel for the appellants has stated frankly that he is not able to ask us to rely upon the evidence given by these three defence witnesses. The second accused examined D.Ws. 5 and 6, and the evidence of these two witnesses is on the face of it rather more respectable than that given by D.Ws. 3, 4 and 7. But the great defect in this plea of *alibi* put up by the second accused is that when he was examined in the Sub-Magistrate's Court he did not mention it. The second accused was arrested very soon

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after the occurence and there was no suggestion put to the police that, as soon as he was arrested, he expressed any astonishment or alleged himself to have been elsewhere. We think it is inconceivable that, if this plea had been a true plea, he could have failed to mention it when questioned by the Magistrate.

It is not possible to doubt the truth of the story told by the prosecution witnesses in its main lines; nor is it possible to doubt the presence and the participation in the rioting of all these accused persons. Mr. Jayarama Iyer's arguments have been chiefly directed towards showing that it would be unsafe to convict the second and the third accused for the murder of Venkataswami. He has examined the evidence given by all the witnesses of the occurence with great care and has attempted to persuade us that, although in the main they are witnesses of truth, yet in the circumstances they could not have been expected to observe with accuracy which of the rioters inflicted the fatal blow on Venkataswami. This is practically the only point seriously urged in these appeals.

[After discussing the evidence and concluding that the second and third accused were proved to be guilty of murder and confirming the death sentence for murder, their Lordships proceeded]:

The learned Sessions Judge has not explained why he framed a charge under Ss. 148 and 149 against all these eight accused; nor has he explained in his judgment, why he thinks S. 149 has any application. The evidence is clear that the first three accused were armed with spears and the other five with sticks. There is no evidence of any witness to show that the sticks in this case were dangerous weapons. The charge framed should therefore have been under S. 147 against accused 4, 5, 6, 7 and 8 and under S. 148 against accused 1, 2 and 3 only, and the accused should have been convicted accordingly. It is just possible that the learned Sessions Judge was guided by the decision in the case of Subbigadu reported at p. 559 of Vol. 50 of the Madras Law Journal. It is there stated that if some members of an unlawful assembly are armed with deadly weapons in prosecution of the common object of the unlawful assembly and if rioting is committed, the other members of the unlawful assembly who are not armed with deadly weapons may be convicted under S. 148 read with

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S. 149. With respect, we think that this decision is of doubtful authority. S. 148 appears to differ from S. 147 precisely in the same way that S. 144 differs from S. 143. Under S. 143 any member of an unlawful assembly is liable to punishment up to six months. Under S. 144 "whoever being armed with a deadly weapon is a member of an unlawful assembly is liable to imprisonment for two years". In exactly the same way, under S. 147, whoever is guilty of rioting is liable to imprisonment up to two years; and under S. 148 whoever being armed with a deadly weapon is guilty of rioting is liable to imprisonment for three years. The same distinction appears in the sections of the Indian Penal Code dealing with robbery. S. 392 provides a punishment for robbery and S. 397 provides an enhanced punishment, in the shape of a minimum sentence, for any robber who at the time of committing robbery or dacoity uses a deadly weapon, and similarly S. 398 provides some punishment for the robber or dacoit who is armed with a deadly weapon. We think that it is clear, as held by the Calcutta High Court in the case *Sabir* v. *Queen Empress*[1], that it is only the robbers who are actually armed with deadly weapons who can be charged and convicted under S. 348. In the case of the robbery sections there is ample authority for the view that we are taking—*Emperor* v. *Nageswar*[2], *Emperor* v. *Dulli*[3], *Emperor* v. *Ali Mirza*[4], and in our own Court *Arunachala Thevan* v. *Emperor*[5]. We think with respect that in Subbigadu's case it is incorrect to say that S. 148 describes a separate offence. The only offence that S. 148 describes or refers to is the offence of rioting and provision is made for enhanced punishment if the rioter at the time of rioting is armed with a deadly weapon. S. 149, we think, is intended to lay upon all the members of an unlawful assembly responsibility for any offences, other than the offence of rioting, committed by any member of the unlawful assembly in prosecution of the common object. S. 149 can hardly have been intended to make rioters constructively guilty of the offence of rioting. If the matter had been of any importance in this case we should have felt it necessary to refer to a Full Bench the question whether the case of *Subbigadu* has been correctly decided. But in this case it is not necessary

1. (1894) I.L.R. 22 Cal. 276.
2. (1906) I.L.R. 28 All. 404.
3. (1924) I.L.R. 47 All. 59.
4. (1923) I.L.R. 51 Cal. 265.
5. (1911) 22 M.L.J. 186.

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since the punishment, for an offence under S. 147 is two years rigorous imprisonment. In modification of the judgment of the learned Sessions Judge we alter the conviction under the first charge to a conviction under S. 148 for accused 1, 2 and 3 and S. 147 for accused 4, 5, 6, 7 and 8.

Viraswami, as we have already said, was very severely hurt. His chest was pierced so that his lung was protruding in one place. It is clear that he had a narrow escape with his life. Why the learned Sessions Judge did not charge the first accused with attempt to murder on the third charge we do not know. It would have been much more appropriate than a charge under S. 326. If Viraswami had no bones broken, the only kind of grievous hurt with which he can be charged in respect of Viraswami was that which is involved in putting Viraswami's life in danger. If a person inflicts hurt upon another with the intention of putting his life in danger, that is the same thing as saying that the offender is trying to kill the man whom he attacks. The first accused may therefore consider himself fortunate in that he was not charged and convicted of an offence under S. 307. The remaining convictions are justified by the evidence and the sentences call for no interference.

The learned Public Prosecutor has brought to our notice that in this case the accused appear to have assembled with a store of weapons close by including three spears. It would have been appropriate to charge all the other accused except the second and third accused with liability for the murder of Venkataswami under S. 149 of the Indian Penal Code. Considering the antecedents of the factions in Masulipatam it would have been difficult for any of the accused to show that he did not expect murder to be done. There is however no petition by the Provincial Government and therefore it is not necessary to say more on this subject.

The result therefore is that the appeals of all the accused are dismissed, the only modification being in the matter of the convictions on the first charge.

K.C. *Appeals dismissed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, MR. JUSTICE VENKATARAMANA RAO, MR. JUSTICE ABDUR RAHMAN, MR. JUSTICE KRISHNASWAMI AIYANGAR AND MR. JUSTICE HORWILL.

Chinnasami Pillai .. *Appellant** (*Petitioner*).

v.

Annamalai Chetty, minor by guardian, the Head Clerk, District Munsif's Court, Dindigul and another ... *Respondents* (*Respondents*).

F.B.

Chinnasami Pillai *v.* Annamalai Chettiar..

Limitation Act (IX of 1908), Art. 182 (5)—Transfer of decree to Court in Native State having reciprocal arrangement with British Indian Government—Whether 'step in aid of execution'.

A money decree obtained on 26th October, 1931 in a British Indian Court was transferred on 25th January, 1932, for execution to the Chief Court, Pudukottah State which had a reciprocal arrangement with the British Indian Government for executing decrees. The decree was re-transferred to the British Indian Court on 29th September, 1936, after infructuous steps taken in the Native State and an execution petition was filed on 10th October, 1936. On a question whether the application to the British Indian Court to send the decree passed by it to a Court in an Indian State for execution, could be regarded as a step in aid of execution within the meaning of Art. 182 (5) of the Limitation Act,

Held, by the Full Bench, that the application to transfer the decree to the Native State was a step in aid of execution for purposes of limitation. *Pierce Leslie* v. *Perumal*, (1917) 33 M.L.J. 130: I.L.R 40 Mad. 1069 (F.B.), overruled.

Held, by the Court (Horwill. J., dissenting) that the application for execution filed on 10th October, 1936, was within time.

Held, by Horwill, J., that the application to execute the decree in the State Court within three years of 25th January, 1932 will not be one that can be recognised by British Courts as made in accordance with law, and more than three years having elapsed between the order of 25th January, 1932 transferring the decree to the Native State Court and 10th October, 1936 when the next application for execution was filed in the British Indian Court, the latter application is barred by limitation.**

Appeal against the order of the Court of the Subordinate Judge of Dindigul dated 18th August, 1937 and passed in A. S. No. 39 of 1937 preferred against the order of the Court of the

* A. A. A. O. No. 72 of 1938. 6th December, 1940.

** [On this point it is also stated in the Judgment of the learned Chief Justice (p 244) that it was conceded on behalf of the Respondents that if the application filed on 21st January, 1932 for transfer of decree to the Pudukottah Court was a step in aid of execution, the application of 10th October 1936, was within time Ed.]

District Munsif of Dindigul dated 10th February, 1937 and passed in E. P. No. 589 of 1936 in O. S. No. 80 of 1931.

F.B.

Chinnasami Pillai v. Annamalai Chettiar.

C.A. Seshagiri Sastri for Appellant.

A. V. Viswanatha Sastri and *N. S. Srinivasan* for Respondents.

This appeal coming on for hearing on 15th December 1939, the Court, *Kunhi Raman, J.* made the following

ORDER OF REFERENCE TO A FULL BENCH.

In my view it is desirable to post this case before a Bench of two Judges in order that the question whether it is necessary to refer the point of law involved in it to a Full Bench may be determined by that Bench. The question that arises for determination is one of limitation, which both the learned Advocates admit is governed by the decision of a Full Bench of this Court reported in *Pierce Leslie* v. *Perumal*[1]. The view taken by that Full Bench has been disapproved of by a Division Bench of the Bombay High Court in the case reported in *Janardhan Govind* v. *Narayan Krishnaji*[2]. In a later case reported in *Srinivasa Iyengar* v. *Narayana Rao*[3], Sir Walter Schwabe, C.J. expressed his views on the Full Bench decision in the following terms:

"I desire to add this that the question whether a similar application to transmit the papers would have been a step in aid if made in British India, in the view that I have expressed, does not arise for decision. If it did, I should feel myself bound by the decision of the Full Bench of this Court in *Pierce Leslie* v. *Perumal*[1]. I must, however, not be taken to agree with that decision. It has been strongly disapproved of by a Division Bench in *Janardhan Govind* v. *Narayan Krishnaji*[2]. The point has been argued before us and the inclination of my mind is to agree with the Bombay decision and not with that of the Full Bench of Madras, and if the same point arises again I should wish to have it re-considered by a Full Bench."

The appeal coming on for hearing in pursuance of the aforesaid Order of Reference,

The Court delivered the following

JUDGMENTS. *The Chief Justice.*—This appeal has been placed before a Full Bench of five Judges because it involves the consideration of the question whether *Pierce Leslie* v. *Perumal*[1] was rightly decided. In that case it was held by a Full Bench of three Judges of this Court that an application to a Court in British India to send a decree passed by it to a Court in a Native State for execution was not a step in aid of execution within the meaning of Art. 182, Cl. 5 of the Limitation Act and therefore did not give a fresh starting point for the period of

Leach, C J.

1. (1917) 33 M.L.J. 130: I.L.R. 40 Mad. 1069 (F.B.).
2. (1918) I.L.R. 42 Bom. 420.
3. (1922) 43 M.L.J. 700: I.L.R. 45 Mad. 1014.

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limitation. The facts were these. On the 21st August, 1911 a decree for money was passed by a British Court in Cochin. On the 7th October, 1912 the decree-holder applied for an order transferring the decree to a District Court in the State of Travancore for execution. The application was granted and on the 13th November, 1912 the decree was transmitted to the District Court named in the application. As the execution proceedings there proved to be infructuous, the decree-holder filed an application for execution in the Court which had passed the decree. This application was filed on the 5th January, 1915 and the Full Bench held that it was out of time because the application of the 7th October, 1912 for the transfer of the decree to the Travancore Court could not be taken into consideration.

The position in the present case is exactly the same. On the 26th October, 1931 the appellant obtained a money decree against the respondents in the Court of the District Munsif of Dindigul. On the 21st January, 1932 the appellant applied to the District Munsif of Dindigul for an order transferring his decree to the Chief Court of the State of Pudukottah for the purpose of execution, and on the 25th January, 1932, his application was granted. The execution proceedings in Pudukottah led to nothing and the decree-holder caused the decree to be re-transferred to the Court of the District Munsif of Dindigul. On the 10th October, 1936, the decree-holder filed an application for execution in that Court and was met by the plea that the application was time-barred. As the case clearly fell within the decision of *Pierce Leslie* v. *Perumal*[1], the District Munsif upheld the objection and on appeal the Subordinate Judge of Dindigul concurred. The decree-holder has now appealed to this Court. It is conceded on behalf of the respondents that if the application which the appellant filed on the 21st January, 1932, in the Court of the District Munsif of Dindigul for the transfer of the decree to the Chief Court of Pudukottah is a step in aid of execution the application of the 10th October, 1936, was within time.

The appeal in *Pierce Leslie* v. *Perumal*[1], came before Oldfield and Bakewell, JJ., who referred to a Full Bench the following questions:

1. Whether the Courts in British India have power to send their decrees to the Courts of the State of Travancore for execution:

1. (1917) 33 M.L.J. 130: I.L.R. 40 Mad. 1069 (F.B.).

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2. If they have this power, whether proceedings thereunder fall within Art. 182 of the Limitation Act, so as to give a fresh period of limitation for further proceedings in execution.

S. 39 of the Code of Civil Procedure permits a Court which has passed a decree to send it for execution to "another Court." Bakewell, J., considered that there was no ground for limiting the expression "another Court" to a Court situate in British India, and construed it as meaning "a Court in which the decree is executable". In this opinion Oldfield J., concurred.

The Full Bench was composed of Wallis, C. J., and Oldfield and Kumaraswami Sastri, JJ. The learned Chief Justice answered the first question by saying that Courts in British India had no power to send their decrees for execution to the Travancore Courts, but might and should send to those Courts the documents they required to enable them to execute decrees passed in British India under the powers conferred upon them by the legislative authority in Travancore. There was no provision in the Code of Civil Procedure which permitted of this being done, but it was a case in which the Court could exercise its inherent powers. The second question was answered in the negative. The reasons given were that the Indian Limitation Act extends only to British India; that it prescribes periods of limitation with regard to the filing of suits and the execution of decrees in British India; that when the Limitation Act makes an application in accordance with law to a proper Court a fresh starting point, it must be taken to mean an application in accordance with the provisions of law in British India to be found in the Code of Civil Procedure to which the Article refers or elsewhere; and that it could not have been the intention of the legislature to make an application for execution to a Court in a foreign State under the law of that State and governed by the law of Limitation there in force a fresh starting point under the Indian Limitation Act for the execution of the decrees of Courts in British India. Oldfield and Kumaraswami Sastri, JJ., agreed.

The decision in *Pierce Leslie* v. *Perumal*[1] was given in 1917. In the following year the same question arose in the Bombay High Court in *Janardhan Govind* v. *Narayan Krishnaji*[2], and Beaman and Heaton, JJ., had no hesitation in holding that an application made to a British Indian Court to transfer its decree

1. (1917) 33 M.L.J. 130: I.L.R. 40 Mad. 1069 (F.B.).
2. (1918) I.L.R. 42 Bom. 420.

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for execution to a Court of a Native State between which and the British Government there existed an agreement to execute each other's decrees, was a step in aid of execution within the meaning of Art. 182 of the Indian Limitation Act. The decision in *Pierce Leslie* v. *Perumal*[1], was rejected in a very forcible judgment by Beaman, J., who considered that it was contrary to commonsense to say that an application to a Court to transfer its decree elsewhere for execution was not a step in aid of execution, and proceeded to give reasons why it was contrary to law. While I am not prepared to express my dissent in the same words I am bound to say, with the greatest respect to the opinions expressed by the learned Chief Justice in *Pierce Leslie* v. *Perumal*[1], and concurred in by Oldfield and Kumaraswami Sastri, JJ., that I agree entirely with the reasons given by Beaman, J., for refusing to follow that decision.

Now let us examine Cl. (5) of Art. 182 of the Indian Limitation Act. It says that for an application for the execution of a decree or order of a Civil Court not provided for by Art. 183 or by S. 48 of the Code of Civil Procedure, 1908, the period of limitation shall be three years (unless a certified copy of the decree or order has been registered in which case the period is six years) and that time shall begin to run from the date of the final order passed on an application made in accordance with law to the proper Court for execution or to take some step in aid of execution. Therefore, an order on an application to take a step in aid of execution comes within this clause when the application is made in accordance with law and presented to the proper Court. There exists and at all material times has existed, an arrangement between the State of Pudukottah and the Government of India whereby the decrees of the State shall be executed by Courts in British India and the decree of British Indian Courts shall be executed by the Courts in the State and it is admitted that the Code of Civil Procedure in force in the State of Pudukottah contains a section corresponding to S. 43 of our Code. Consequently, the appellant was in order in applying to the District Munsif's Court of Dindigul to transfer his decree to the Chief Court of Pudukottah and, as was recognised in *Pierce Leslie* v. *Perumal*[1], the District Munsif had full power to grant the application. The requirements of Cl. (5) of Art. 182 were

1. (1917) 33 M.L.J. 130 : I.L.R. 40 Mad. 1069 (F.B.).

fully complied with. In my judgment it is going to a length altogether unwarranted to say that because there is no express provision in the Code of Civil Procedure for such an application a Court in British India is precluded from giving to Cl. (5) of Art. 182 of the Limitation Act its plain meaning. If the application which the appellant made to the District Munsif's Court of Dindigul on the 21st January, 1932, is not a step in aid of execution I fail to see what else it can be. The judgment in *Pierce Leslie* v. *Perumal*[1], goes to the extreme lengths of the technicality, but even on technical grounds I consider that it cannot be supported and should be overruled.

In *Srinivasa Aiyangar* v. *Narayana Rao*[2], a Bench of this Court (Schwabe, C. J. and Wallace, J.,) had to consider whether an application filed in a Court of the State of Mysore for the transmission of a decree to this Court for purposes of execution was a step in aid of execution. That question does not arise in the present appeal and therefore does not call for discussion, but Schwabe, C. J., in deciding *Srinivasa Aiyangar* v. *Narayana Rao*[2], indicated his disapproval of the decision in *Pierce Leslie* v. *Perumal*[1], and said that if the same point arose again he would wish to have it re-considered. That opportunity has arisen in the present case. While it is not necessary to decide whether an application made to a Court in a Native State for the transfer of a decree to a Court in British India is a step in aid of execution within the meaning of Art. 182 it may be mentioned that in *Fatechand Rampratap* v. *Jitmal Rupchand*[3], it was held that an application made by a decree-holder for the return of his decree from a Court in a Native State to a Court in British India was a step in aid of execution under that Article.

Neither is it necessary to decide whether the opinion expressed by Bakewell, J., in *Pierce Leslie* v. *Perumal*[1], that the words 'another Court' in S. 39 of the Code of Civil Procedure apply to a Court outside British India is well founded, but if this was the only argument open to the appellant it is obvious that there would be great difficulty in his way. The word "Court" throughout the Code of Civil Procedure, unless it is preceded by the adjective "foreign"—"foreign Court" is defined in S. 2 (5)—means *prima facie* a

1. (1917) 33 M.L.J. 130: I.L.R. 40 Mad. 1069 (F.B.).
2. (1922) 43 M.L.J. 700: I.L.R. 45 Mad. 1014.
3. (1929) I.L.R. 53 Bom. 844.

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Court in British India because the Code of Civil Procedure can only govern procedure in British India. But the appellant's case does not rest on this argument. It rests on much firmer ground, as I have indicated, and I hold that his application of the 21st January, 1932, to the District Munsif of Dindigul for the transfer of his decree to the Chief Court of Puddukottah was a step in aid of execution and therefore the order on the application started a fresh period of limitation, which means that his application for execution presented to the District Munsif of Dindigul on the 10th October, 1936, was within time.

For the reasons indicated I would allow the appeal with costs and remand the case to the District Munsif to hear and determine in the light of this judgment the applicacion which the appellant has filed for the execution of his decree.

Venkataramana Rao, J. Abdur Rahman, J. Krishnaswami Aiyangar, J. Horwill, J.

Venkataramana Rao, J.—I agree

Abdur Rahman, J.—I concur.

Krishnaswami Aiyangar, J.—I agree.

Horwill, J.—Despite the trenchant criticism of the decision in *Pierce Leslie* v. *Perumal*[1], by Beaman, J., in *Janardhan Govind* v. *Narayan Krishnaji*[2], I am unable to find any flaw in the reasoning of Sir John Wallis, C. J., in the former case which leads him and the learned Judges who sat with him to the conclusion that Courts in British India have no power to send their decrees for execution to a foreign Court, that an application to a foreign Court to execute the decree of a British Court under powers conferred upon it by the legislative authority of a foreign State would not be an application in accordance with law to the proper Court for execution, and that an application to a British Court to take a step in aid of the execution by a foreign Court of the decree would not be a step in-aid of execution within the meaning of the fifth clause of Art. 182 of the Limitation Act. The reasons for this decision may be highly technical; but the decision has been the law of this province for 33 years, and yet the legislature has not seen fit to enact a section complementary to S. 45 of the Code of Civil Procedure.

S. 38 of the Code of Civil Procedure permits execution only by the Court that passed the decree and by the Court to which it is sent for execution. If the word "Court, in the Code

1. (1917) 33 M L J 130: I.L R. 40 Mad. 1069 (F.B.).
2. (1918) I.L.R. 42 Bom. 420.

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of Civil Procedure means only a British Court, then it would follow from this section that a foreign Court cannot execute a British decree and that what is termed "execution" by a foreign Court is not recognised as such by the Code of Civil Procedure as far as British decrees are concerned. With regard to foreign decrees the position is different, because S. 45 permits the execution of foreign decrees in British Courts as if they were British decrees. When a foreign decree is so recognised and can be executed in British Courts, it may seem unreasonable, and not in consonance with the spirit of S. 45, if it were held that British Courts could not give recognition to the execution by foreign Courts of their own decrees. However, that point does not arise for decision here. It is fully discussed in *Srinivasa Aiyangar* v. *Narayana Rao*[1], to which my Lord the Chief Justice has made reference.

I do not however think that from those findings of the Full Bench in *Pierce Leslie* v. *Perumal*[2], set out above it necessarily follows that an application in a British Court to transfer the decree to a foreign Court for execution is not a step in aid of execution made according to law. In due course, after proceedings have been conducted in a foreign Court, the decree will be returned to the British Court; and to the extent that the decree-holder has been paid out of the assets of the judgment-debtor as a result of those proceedings satisfaction will be recorded in the British Court. The application to transfer the decree to the foreign Court may therefore be regarded not merely as a step in aid of the proceedings in the foreign Court, but as a step in aid of the execution in the British Court after the decree is returned.

It would follow from what I have said above that the application of the 21st January, 1932, to transfer the decree to the Chief Court of Pudukottah was a step in aid of execution. This however would not help the appellant because, in my view, the next application for execution was not until 10th October, 1936, more than three years after the final order of the 25th January, 1932, passed on the application of the 21st January, 1932. It cannot now be denied that there was an application in the Pudukottah Court to execute the decree within three years of the 25th January, 1932; but that application was not, in my

1. (1922) 43 M.L.J. 700: I.L.R. 45 Mad. 1014.
2. (1917) 33 M.L.J. 130 I.L.R. 40 Mad. 1069 (F.B.)

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opinion, one that can be recognised by British Courts as made in accordance with law. This means that I have reluctantly to disagree with my Lord the Chief Justice and my learned brothers and to express the opinion that this appeal should be dismissed with costs.

K.S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

T. V. Bashyakar and others .. *Appellants** (*Petitioners*)

v.

The Madras Hindu Religious Endowments Board, by its President and others ..*Respondents* (*Respondents*).

Bashyakar v. Madras Hindu Religious Endowments Board.

Madras Hindu Religious Endowments Act (II of 1927), S. 9 Cls. (*5*) *and* (*6*)—*S.* 84 (2)—*Appeal whether lies against order of Court—Revision whether lies—Court to decide whether a temple is or is not an excepted temple—Hereditary trusteeship—How to be made out.*

No appeal lies against an order of Court under S. 84 (2) of the Madras Hindu Religious Endowments Act; but a revision can lie from the decision of the Court.

Rajagopala Chettiar v. *Hindu Religious Endowments Board, Madras,* (1933) 66 M L.J. 43: I.L.R. 57 Mad. 271 (F.B.), followed.

Chikkanna v. *Perumal,* (1940) 1 M.L J. 732: I.L R. 1940 Mad. 791, referred to.

Cl. (6) of S 9 of the Act defines a hereditary trustee as the trustee of a religious endowment "succession to whose office devolves by hereditary right or by nomination by the trustee for the time being, or is otherwise regulated by usage or is specially provided for by the founder so long as such scheme of succession is in force." This definition enumerates four methods of devolution which qualify a trustee to be known as a hereditary trustee. Of these four methods of devolution, the first and the last have been specified as qualifying a temple to be considered an excepted temple. On the general rule *expressio unius exclusio alterius* it is impossible to resist the inference that when the Legislature in the definition of an excepted temple specified only two of the four types of devolution which are recognised in the definition of a hereditary trustee, they intended to exclude the other two types of devolution. Therefore it follows that a temple whose trustee succeeds by nomination by his predecessor or merely in accordance with usage, does not come within the definition of an excepted temple.

Where a temple was governed by a scheme laid down by Court by which the hereditary trusteeship was vested in a particular family and the lower court overlooked that fact in deciding whether or not the temple was an

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* Appeal No. 298 of 1940 and C. R. P. No. 1355 of 1940. 14th November, 1940.

excepted temple and never took into consideration the mode of succession to the trusteeship during the period immediately preceding the application to the Board,

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Held, that in dealing with the materials in this manner the lower Court acted illegally in the exercise of its jurisdiction.

Held also, that having regard to the provisions of the scheme the temple was not a temple the succession to trusteeship whereof was hereditary.

Appeal, and petition under S. 115 of Act V of 1908 and S. 224 of the Government of India Act, 1935, praying that the High Court will be pleased to revise the order of the District Court of Chingleput dated 9th April, 1940 and made in O. P. No. 8 of 1940.

C. Narasimhachariar for Appellants.

K. Bashyam Aiyangar, T. R. Srinivasan, P. V. Rajamannar and *M. Seshachalapathi* for Respondents.

The Judgment of the Court was delivered by

Wadsworth, J.

Wadsworth, J.—This appeal and the Civil Revision Petition which is filed in the alternative challenge the correctness of the decision of the District Judge of Chingleput on an application to set aside an order of the Hindu Religious Endowments Board declaring the temple of Sri Devarajaswami at Conjeeveram to be an excepted temple on the ground that the right of succession to the office of trustee has been hereditary. The learned District Judge agreed with the view of the Board that the temple was an excepted temple within the definition in S. 9 (5) of the Madras Hindu Religious Endowments Act.

A preliminary objection raises the question whether the appeal is maintainable and if not whether there are any grounds which justify interference in revision. In our opinion, there is no right of appeal against the order of the Court under S. 84 (2) of the Madras Hindu Religious Endowments Act. So much was decided by the Full Bench which heard the case of *Rajagopala Chettiar* v. *Hindu Religious Endowments Board, Madras*[1]. It has however been contended that this decision is no longer authoritative in the light of the decision of a later Full Bench in the case of *Chikkanna* v. *Perumal*[2], but we are unable to accept this contention. It is true that the later decision expresses the view that in the light of subsequent Privy Council decisions, *Rajagopala Chettiar's case*[1], has given an explanation

1. (1933) 66 M.L.J. 43: I.L.R. 57 Mad. 271 (F.B.).
2. (1940) 1 M.L.J. 732: I.L.R. 1940 Mad. 791 (F.B.).

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of the decision of the Privy Council in *Ramachandra Rao* v. *Ramachandra Rao*[1], which can no longer be regarded as authoritative; but the Full Bench which took this view was not concerned with the correctness of the decision of the earlier Full Bench regarding the appealability of an order under S. 84 (2) of the Madras Hindu Religious Endowments Act. All that the learned Judges were concerned with was the earlier Full Bench's interpretation of a Privy Council decision which was quoted in support of an argument that a decision under S. 84 (2) of the Madras Hindu Religious Endowments Act was a decree. *Ramachandra Rao's case*, like *Chikkanna's case* was concerned with the finality of a decision on a reference to the Court by the Collector under S. 30 of the Land Acquisition Act. The learned Judges who decided the case of *Rajagopala Chettiar*[1], advanced various reasons for holding that a decision under S. 84 (2) of the Hindu Religious Endowments Act is not a decree. Though a portion of the reasoning in the judgment may be said to have been shaken by the later Full Bench decision, it cannot, in our opinion, be said that the decision, in *Rajagopala Chettiar's case*[2], is no longer good law in so far as it decides the main question before the Full Bench. That decision binds us and we must hold that no appeal lies against the order of the District Judge. The matter is not one of very great importance in the present case, for an alternative revision petition has been filed and we are of opinion that there are materials for holding that the District Judge has acted illegally in the exercise of his jurisdiction, so as to justify interference in revision under S. 115 of the Code of Civil Procedure.

The Sri Devarajaswami temple is governed by a scheme laid down by this Court in the case of *Thathachariar* v. *Thathachariar*[3]. This decision sets forth at length the previous history of the disputes regarding the management of the temple. We do not propose to repeat this historical matter. It is only necessary to say that in this scheme suit the plaintiffs claimed that the hereditary right of Dharmakartaship appertained to the lineal descendants of one Koti Kanyakadanam Thatha Desikar. The contesting parties were the existing trustees and certain

1. (1922) 43 M.L.J. 78: 49 I.A. 129: I.L.R. 45 Mad. 320 (P.C.).
2. (1933) 66 M.L.J. 43: I.L.R. 57 Mad. 271 (F.B.)
3. (1912) 23 M.L.J. 134.

other claimants who fell into different groups. One group represented by defendants 1 and 5 to 8 contended that the trusteeship belonged to a particular branch of the large clan of descendants of Thatha Desikar by succession to an ancestor who was appointed as trustee by the Government in 1842. At the commencement of the judgment, the learned Judges point out that the contention in the plaint that the hereditary right of Dharmakartaship resides in all members of the family descended from Thatha Desikar was given up, that nothing more was claimed for the members of the Thathachars' family generally than the right to elect trustees and certain rights of interference beyond what ordinary worshippers possessed; and this concession is referred to again at p. 142 of the judgment where the learned Judges state:

> "The vakil for the Thathachars generally admitted that the members of the family did not claim any right to trusteeship on behalf of all the members of the Thathachar families as a body."

The learned Judges after reviewing the evidence came to the conclusion that neither the first defendant nor any of the members of his family could claim any exclusive right to the office of trustee. They held that the title of that branch of the family had been extinguished, that it was not an ancient title, but one derived if at all only under the appointment of the Government in 1842. In the light of these concessions and findings, the learned Judges proceeded to lay down a scheme. Cl. 3 prescribes that no one shall be eligible to be a trustee who is not a lineal male descendant of Thatha Desikar, between the ages of 25 and 50, permanently residing within fifty miles of Conjeeveram and not disqualified by criminal conviction, insolvency, insanity etc., and it also lays down that no two members of a joint family shall at the same time be trustees and that of the five trustees three should belong to one branch and two to another branch of the descendants of Thatha Desikar. Having prescribed these qualifications, the scheme proceeds to lay down the manner of election. Trustees were to hold office for five years and were to be elected by the whole body of the adult lineal male descendants of Thatha Desikar. It will be seen that this scheme while recognising the hereditary right of the descendants of Thatha Desikar to appoint trustees from out of their number, prescribes a mode of succession to the office which is essentially elective and not hereditary.

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An attempt has been made to argue that when a trustee is appointed by election from amongst the members of a certain family or group of families, the trusteeship is hereditary and in support of this contention, the decision of *Madana Polo* v. *The Hindu Religious Endowment Board, Madras*[1] has been quoted. We do not consider that this decision has any application to the present facts. The learned Judges were dealing with evidence which justified the inference that the actual trusteeship resided in a particular family, though the rights were exercised by only one member of that family. We are concerned here with a carefully drafted constitution embodied in a scheme which proceeds on decisions set forth in a considered judgment. That judgment expressly rests on the admission that the actual trusteeship does not reside in the general body of the descendants of Thatha Desikar and on the basis of this admission and the evidence in the case, it provides that the descendants of Thatha Desikar shall constitute the electoral body and that only the descendants of Thatha Desikar shall be qualified for election. In our view, on such facts, though the power of election and the qualification for election are hereditary, the succession is not hereditary.

An attempt has been made to argue that the definition of "hereditary trustee" in Cl. (6) of S. 9 of the Act has to be read into the definition of "an excepted temple" in Cl. (5) of that section. The definition of "an excepted temple" runs as follows:

"Excepted temple means and includes a temple, the right of succession to the office of trustee or the offices of all the trustees (where there are more trustees than one) whereof has been hereditary, or the succession to the trusteeship whereof has been specially provided for by the founder".

The next clause defines a hereditary trustee as the trustee of a religious endowment,

"succession to whose office devolves by hereditary right or by nomination by the trustee for the time being, or is otherwise regulated by usage or is specially provided for by the founder so long as such scheme of succession is in force."

It will be seen that this definition enumerates four methods of devolution which qualify a trustee to be known as a hereditary trustee. Of these four methods of devolution, the first and the last have been specified as qualifying a temple to be

1. (1937) 2 M.L.J. 830.

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considered an excepted temple. On the general rule *expressio unius exclusio alterius* it is impossible to resist the inference that when the legislature in the definition of an excepted temple specified only two of the four types of devolution which are recognised in the definition of a hereditary trustee, they intended to exclude the other two types of devolution. It seems to us therefore to follow that a temple whose trustee succeeds by nomination by his predecessor or merely in accordance with usage, does not come within the definition of an excepted temple.

In our opinion the learned District Judge has wholly misdirected himself regarding the basis for the decision of the matter referred to him. The words "has been hereditary" in the definition of an excepted temple clearly indicate a state of affairs which has prevailed in the past and continues up to the present. The learned District Judge has dismissed the scheme in one or two sentences at the end of his judgment and has devoted some 45 pages to a discussion of the ancient history of this institution in order to reach a conclusion that in the past the office of trusteeship of this temple was held hereditarily by the whole clan of the descendants of Thatha Desikar. Having arrived at this conclusion, he reads the judgment in *Thathachariar* v. *Thathachariar*[1], as having adopted that view, though the learned Judges expressly point out that the contention to that effect has been abandoned and he concludes, in disregard of the facts, that the scheme recognises that a hereditary trusteeship vests in the Thathachariar's family. The learned District Judge overlooks the fact that in deciding whether or not a temple is an excepted temple, the Court must have regard to the mode of succession to the trusteeship during the period immediately preceding the application to the Board. He devotes no detailed consideration to the scheme which has prevailed in this temple since 1912 and he appears to have treated the question which he had to decide as a matter for historical research with little regard to the legal effect of the existing constitution. We are of opinion that in dealing with the materials in this manner, the learned District Judge has acted illegally in the exercise of his jurisdiction. We are also emphatically of the opinion that this temple

1. (1912) 23 M.L.J. 134.

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is not a temple the succession to the trusteeship whereof is hereditary, having regard to the provisions of the scheme.

We therefore set aside the order of the District Judge and declare the temple to be a non-excepted temple. The respondents other than the 1st respondent will pay the costs of the petitioners in the Civil Revision Petition which is allowed. The appeal is dismissed; no order as to costs.

K. C. *Appeal dismissed.*
Petition allowed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

Raman Chettiar .. *Petitioner* (Respondent Plaintiff).*

v.

Perumal Udayar .. *Respondent (Petitioner Defendant.)*

Raman Chettiar v. Perumal Udayar.

Madras Agriculturists' Relief Act (IV of 1938), Ss. 9 and 19—Plaint for balance of principal and interest on renewed pro-note after appropriation—Re-opening not permissible.

The respondent on 26th June, 1932 executed a promissory note for Rs. 663 in renewal of two earlier notes, the principal of which totalled Rs. 350. On 26th June, 1934, Rs. 111-8-0 was paid for interest and Rs. 323 was paid for principal leaving a balance of Rs. 140 due. On 15th December, 1934, Rs. 8 was paid for interest and Rs. 40 for principal leaving a balance of Rs. 100. A suit was filed in December, 1937 for Rs. 100 and subsequent interest and a decree was given on 4th March, 1938. On an application to scale down the decree,

Held, the parties actually intended to appropriate these payments towards the real principal of the suit promissory note, which comprised both principal and interest of the earlier notes. The debtor cannot prove that there was an appropriation to the principal only of the earlier notes or that any interest was left outstanding on those notes to be cancelled as on 1st October, 1937. The creditor is entitled to a decree for Rs. 100 with interest at 6¼ per cent and costs and interest thereon at 5 per cent. up to 22nd March, 1938 and thereafter at 6 per cent per annum.

Petition under S. 25 of Act IX of 1887, praying that the High Court will be pleased to revise the order of the Court of the District Munsif of Kulitalai dated 4th March, 1939 and made in I.A. No. 18 of 1939 (I.A. No. 771 of 1939 in S. C. S. No. 3500 of 1937, Small Cause Court, Trichinopoly).

M. S. Vaidyanatha Aiyar for Petitioner.

T. V. Ramanatha Aiyar for Respondent.

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*C.R.P. No. 1707 of 1939. 18th December, 1940.

Raman Chettiar v. Perumal Udayar.

The Court delivered the following

JUDGMENT.—The respondent on 26th June, 1932 executed a promissory note for Rs. 463 in renewal of two earlier notes, the principal of which totalled Rs. 350. On 26th June, 1934 Rs. 111-8-0 was paid for interest and Rs. 323 was paid for principal, leaving a balance of Rs. 140 due. On 15th December 1934, Rs. 8 was paid for interest and Rs. 40 for principal having a balance of Rs. 100. The suit was filed in December, 1937 for Rs. 100 and subsequent interest and a decree was given on 4th March, 1938. In scaling down this decree under S. 19 of Madras Act IV of 1938, the lower Court has treated the appropriations towards principal as having been made, not towards the actual principal of the suit note but towards the notional principal as calculated according to the explanation to S. 8. This is an error. The parties actually intended to appropriate these payments towards the real principal of the suit note which comprised both principal and interest of the earlier notes. The debtor cannot prove that there was an appropriation to the principal only of the earlier notes or that any interest was left outstanding on those notes to be cancelled as on 1st October, 1937. The petitioner is therefore entitled to a decree for Rs. 100 with interest at 6½ per cent. from 1st October, 1937 up to the date of the decree and subsequent interest at 6 per cent. and costs and interest thereon at 5 per cent. from the date of the decree to 22nd March, 1938 and thereafter at 6 per cent. Petitioner will be entitled to his costs in revision.

K. S. *Petition allowed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, MR. JUSTICE GENTLE AND MR. JUSTICE KRISHNASWAMI AIYANGAR.

F.B.

Sri Kasikananda Gnanacharya Swamigal v. Saravana Perumal Pillai.

Sri Kasikananda Gnanacharya Swamigal .. *Appellant* (Plaintiff Respondent)*

v.

Saravana Perumal Pillai and another: *Respondents (Defendants Appellants).*

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* L. P. A. No. 70 of 1939. 9th December, 1940.

F.B.

Sri Kasikananda Gnanacharya Swamigal *v.* Saravana Perumal Pillai.

Limitation Act (IX of 1908), S. 14—Good faith of person claiming to come within section in pursuing his remedy in other proceedings—Burden of proof.

A person claiming the benefit of S. 14 must show that he comes within it, and the burden is on the plaintiff to prove that he acted in good faith in instituting the earlier proceedings. S. 103 of the Evidence Act expressly states that the burden of proof of any particular fact lies on the person who affirms it, unless it is provided by law that the proof lies elsewhere.

Decision of Wadsworth, J., affirmed.

Alagappa Chettiar v. Somasundara Chettiar, 1937 M.W.N. 465, overruled.

Benoderam Sen v. Brojendro Narain Roy, (1873) 21 W.R. 97 and *Roy Dhunput Singh v. Madhomotee Debia,* (1872) 18 W.R. 76, explained and distinguished.

Appeal under Cl. 15 of the Letters Patent against the decree and judgment of the Honourable Mr. Justice Wadsworth dated 25th August, 1939 passed in C. M. A. No. 260 of 1938 preferred against the order of the Court of the Subordinate Judge of Sivaganga dated 10th March, 1939 passed in A. S. No. 77 of 1937 (O.S. No. 23 of 1937, District Munsif's Court, Manamadura).

K. Rajah Aiyar and *P. P. Ramabhadra Aiyar* for Appellant.

V. Ramaswami Aiyar for Respondents.

The Court delivered the following

Leach, C.J.

JUDGMENTS. *The Chief Justice.*—The only question which arises in this appeal is whether a person who claims to come within S. 14 of the Limitation Act has to show that in pursuing his remedy in other proceedings he acted in good faith or whether the burden of showing lack of good faith is on his opponent. The appellant obtained a decree on a promissory note against one Nataraja Pillai on the 22nd October, 1930. On the 10th December, 1931, Nataraja Pillai sold certain immoveable properties to the respondents. On the 12th August, 1932, the appellant attached these properties in execution of the decree which he had obtained on the promissory note and at the sale, which was held on the 15th January, 1935, he purchased the properties. When he desired to enter into possession he was obstructed by the respondents, who claimed title by reason of their purchase of the properties on the 10th December, 1931. On the 27th June, 1935, the appellant applied to the District Munsif of Manamadura, in whose Court the execution proceedings had taken place, for an order against the

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respondents under O. 21, r. 97 of the Code of Civil Procedure requiring them to deliver possession to him. This application was dismissed by an order of the District Munsif passed on the 14th October, 1935. The appellant preferred an appeal to the Subordinate Judge of Sivaganga, who dismissed it on the 26th November, 1936, on the ground that the appellant's remedy was by suit and not by an appeal. R. 103 of O. 21 provides that a party, not being a judgment-debtor, against whom an order is made under r. 98, r. 99 or r. 101 may institute a suit to establish the right which he claims to the present possession of the property; but, subject to the result of a suit the order is conclusive.

On the 7th December, 1936, the appellant instituted the suit out of which this appeal arises. He asked for a declaration that the sale of the properties to the respondents was invalid and for an order requiring them to vacate. The respondents pleaded that the suit was barred by the law of limitation, and clearly it was if the time taken up by the appeal from the order of the District Munsif dismissing the appellant's application under O. 21, r. 97, was not to be excluded. The District Munsif held that the respondents' plea was well-founded and dismissed the suit but his decision was reversed on appeal by the Subordinate Judge. The respondents appealed to this Court, and their appeal was allowed by Wadsworth, J., who, however, gave a certificate which has permitted of the filling of the present appeal under Cl. 15 of the Letters Patent.

There is nothing on the record which shows the circumstances under which the appellant filed the appeal against the dismissal of his application under O. 21, r. 97, and the decision in this appeal must turn on the question on whom lies the burden of proof. S. 14 of the Limitation Act says:

"In computing the period of limitation prescribed for any suit, the time during which the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a Court of first instance or in a Court of appeal, against the defendant, shall be excluded, where the proceeding is founded upon the same cause of action and is prosecuted in good faith in a Court which, from defect of jurisdiction, or other cause of a like nature, is unable to entertain it."

Then follow three explanations, but it is not necessary to set them out. S. 2 (7) defines "good faith" for the purposes of the Act. The definition is that nothing shall be deemed to be done in good faith which is not done with due care and

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attention. I should have thought that when a person is claiming the benefit of S. 14 of the Limitation Act he must prove that he acted in good faith in instituting the earlier proceedings. O. 7, r. 6 of the Code of Civil Procedure states that where the suit is instituted after the expiration of the period prescribed by the law of limitation, the plaint shall show the ground upon which exemption is claimed. This must mean that when a suit has been filed beyond the period allowed by law the burden of proving that there is ground for exemption from limitation is on the plaintiff, but apart from this the wording of S. 14 of the Limitation Act seems to me to be here quite clear.

But a different opinion has been expressed by a Bench of this Court. In *Alagappa Chettiar* v. *Somasundara Chettiar*[1], Varadachariar, J., sitting with Mockett, J., discussed S. 14 of the Limitation Act, and it would appear that he was of the opinion that the Privy Council in deciding *Benoderam Sen* v. *Brojendro Narain Roy*[2], had placed the burden of proof on the defendant and not on the plaintiff. With the greatest respect to all that was said in the judgment of Varadachariar, J., I am unable to agree that the Judicial Committee can there be taken to have laid down a rule that a person seeking the benefit of S. 14 of the Limitation Act is not required to show that he acted *bona fide* in the previous proceedings and that it is incumbent on his opponent to prove *mala fides*. In that case the Privy Council were considering the effect of S. 10 of the Limitation Act of 1859 and not of S. 14 of that Act, which corresponds to S. 14 of the present Act. S. 20 of the Act of 1859 corresponds to Art. 182 of the Act of 1908 and it reads as follows:

"No process of execution shall issue from any Court not established by Royal Charter to enforce any judgment, decree or order of such Court, unless some proceeding shall have been taken to enforce such judgment, decree or order or to keep the same in force within three years next preceding the application for such execution."

It was alleged in *Benoderam Sen* v. *Brojendra Narain Roy*[2], that certain proceedings in execution had not been instituted *bona fide* and therefore the decree-holder was not entitled to claim a fresh starting point of limitation by reason of his application. There was nothing in the Limitation Act of 1859 which required the decree-holder to show *bona fides*, but

1. (1937) M.W.N. 465. 2. (1873) 21 W.R. 97.

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in resisting the proceedings the person concerned set up a specific charge of *mala fides*. The Judicial Committee decided that in such circumstances the person who alleged *mala fides* ought to prove his allegation. There is nothing in the judgment in that case or in the judgment of the Privy Council in the earlier case of *Roy Dhunput Singh* v. *Modhomotee Debia*[1], the earlier case was referred to in *Benoderam Sen* v. *Brojendra Narain Roy*[2], which can in my opinion be taken as supporting the interpretation placed upon S. 14 of the Limitation Act in *Alagappa Chettiar* v. *Somasundaram Chettiar*[3].

As I have already indicated a person who asks the Court to hold that he is entitled to the benefit of S. 14 must in my judgment show that he comes within it. To the reasons I have given I may add that S. 103 of the Evidence Act expressly states that the burden of proof of any particular fact lies on the person who wishes the Court to believe in its existence, unless it is provided by law that the proof lies elsewhere. I have no hesitation in holding that in this case the burden of proving that he acted *bona fide* in his earlier action rests on the appellant. He has not made any attempt to show that in filing the appeal against the claim order he was acting on advice and the Court is left in entire ignorance why he appealed from the order on his application under O. 21, r. 97 before he filed the present suit. As the appellant has not shown that in filing the appeal he acted in good faith he is not entitled to the benefit of S. 14 of the Limitation Act.

For these reasons I consider that the decision of Wadsworth, J., was correct and that the appeal should be dismissed with costs.

Gentle, J.

Krishnaswami Aiyangar, J.

Gentle, J.—I agree.

Krishnaswami Aiyangar, J.—I also agree but I desire not to be understood as expressing any opinion on the question whether an appeal lay to the Subordinate Judge in the prior proceedings or not. The matter was argued on the assumption that no such appeal lay and that the remedy was by way of suit only.

K. S. *Appeal dismissed.*

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1. (1872) 18 W.R. 76.
2. (1873) 21 W.R. 97.
3. 1937 M.W.N. 465.

[FULL BENCH].

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Ordinary Original Civil Jurisdiction].

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, MR. JUSTICE KING AND MR. JUSTICE PATANJALI SASTRI.

Al. Vr. St. Veerappa Chettiar, Devakotta .. *Petitioner**

v.

Commissioner of Income-tax, Madras .. *Respondent.*

F.B.

Veerappa Chettiar *v.* Commissioner of Income-tax, Madras.

Income-tax Act (XI of 1922), Ss. 2 (1) and 3—Simple mortgage—Suit on—Receiver appointed in—Rents collected and paid over to mortgagee—Whether agricultural income—Profits of mortgage—Accrual—Computation for assessment.

Under a compromise decree dated 28th July, 1928, in a suit on a simple mortgage the mortgagor was to pay to the mortgagee a sum of Rs. 3,75,000 in full settlement of all claims, on or before 31st July, 1931. In the meantime this amount was not to carry interest. In the event of this amount not being paid by the due date the hypotheca was to become the absolute property of the mortgagee. By the decree a receiver was also appointed and it was a term of the compromise that any money which the mortgagee received from the receiver should be set off against the Rs. 3,75,000 and that the mortgagor should only be responsible for the balance. If the balance was not paid the whole of the hypotheca was still to become the property of the mortgagee. From 28th July, 1928, the date of the decree to 31st July, 1931, Rs. 42,000 was paid into Court by the receiver as the net rent collections and the amount was later on paid to the petitioner. The mortgagor did not pay the amount according to the terms of the compromise on 31st July, 1931, and the mortgagee consequently became the absolute owner of the properties. The right of the mortgagee to possession was finally decided by the High Court on 2nd September, 1936. The account books of the mortgagee showed the mortgagor as debtor till this date when the accounts were closed and the moneys received in connection with the loan were transferred to a new account opened in the mortgagee's own name. The income-tax authorities sought to include in the assessable income of the mortgagee all sums received on account of the mortgage though they had been received more than 3 years before the year of account, as well as the sum of Rs. 42,000 deposited in Court by the receiver and withdrawn by the mortgagee. It was contended that the latter amount was agricultural income.

Held, (i) As the assessee was neither the owner nor even a usufructuary mortgagee of the properties but a simple mortgagee whose title to the properties did not vest in him until after all these moneys had been collected and paid into Court in reduction of the mortgage debt, the amount cannot be said to be "agricultural income".

Commissioner of Income-tax v. *Maharajadhiraja of Dharbhanga*, (1935) 69 M.L.J. 474: L.R. 62 I.A. 215: I.L.R. 14 Pat. 623 distinguished.

(ii) As the transaction was closed only in 1936 it was not until that year that profits could properly be calculated and the income-tax authorities were hence fully entitled to assess on that basis.

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* O. P. No. 114 of 1940. 25th September, 1940.

F.B.

Veerappa Chettiar v. Commissioner of Income-tax, Madras.

Leach, C.J.

Reference under S. 66 (2) of the Indian Income-tax Act (XI of 1922) by the Commissioner of Income-tax, Madras.

K. V. Sesha Aiyangar for the Commissioner.

R. Kesava Aiyangar, S. R. Krishnamachariar and *S. Srinivasan* for the Assessee.

The judgment of the Court was delivered by

The Chief Justice.—The petitioner is the managing member of an undivided Hindu family and as such he has been assessed to income-tax for the year 1937-38. The family belongs to the Nattukottai Chettiar community and carries on a money-lending business. In the year, 1913, the petitioner's father advanced Rs. 2,15,000 to Bangaru Ammal, the Zamindarini of Thevaram, on the security of the Zamindari. The loan was not repaid and in 1925 the petitioner was compelled to file a suit in the Court of the Subordinate Judge of Dindigul to enforce payment of the amount then due. Accumulations of interest, it was said, had brought the figure up to Rs. 5,49,683 but this was denied. A compromise was eventually agreed upon and a decree was passed by the Subordinate Judge embodying the terms of settlement. Under this decree the debtor was to pay to the petitioner a sum of Rs. 3,75,000 in full settlement of all claims on or before the 31st July, 1931. In the meantime this sum was not to carry interest. In the event of the amount not being paid by the due date the Zamindari was to become the absolute property of the petitioner's family. By this decree a receiver was appointed and it was a term of the compromise that any moneys which the petitioner received from the receiver should be set off against the Rs. 3,75,000 and that the debtor should only be responsible for the balance. It was, however, stipulated that in the event of the balance not being paid the whole of the Zamindari would still become the property of the petitioner's family. From the 28th July, 1928, the date of the compromise decree, to the 31st July, 1931, Rs. 42,000 was paid into Court by the receiver as the net rent collections for that period. This amount was later on paid to the petitioner. The sum due to be paid to the petitioner under the terms of the compromise decree on the 31st July, 1931, was not paid and in consequence his family became the absolute owners of the Zamindari. The estate was not, however, handed over to the petitioner until the 2nd February, 1933.

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The Zamindarini died on the 14th December, 1930, and her heir was her mother Errammal. Errammal died on the 2nd February, 1933, leaving a will by which she purported to bequeath the Zamindari to one Thangaswami Naicker, who with two others challenged the right of the petitioner to obtain possession of the estate. The case was carried to this Court and the litigation did not end until the 2nd September, 1936, when the title of the petitioner's family to the property was finally decided. Until this had happened the account books of the petitioner showed the Zamindarini as the debtor, but the title of the petitioner's family having been confirmed he closed this account and opened one under his own name transferring to that account the moneys which he had received in connection with the loan.

In assessing the petitioner as the manager of the family for the year 1937-38 the Income-tax authorities have included the profit which they calculated has been made out of this mortgage transaction. The profit has been calculated at the sum of Rs. 2,57,998, less Rs. 84,700 which had been received towards the loan before 1924. The petitioner objected to an assessment being made on this basis and he requested the Commissioner of Income-tax to refer to this Court, under the provisions of S. 66, of the Income-tax Act, the questions raised by him. In accordance with this request the Commissioner has referred the following questions:—

"(1) Whether the sum of Rs. 42,000 deposited in the Court between July 1928 and July, 1931 and withdrawn by the petitioner and adjusted as income in the year of account is agricultural income.

(2) Whether the entire income excluding the sum of Rs. 84,700 interest realized in 1915 to 1923 from this transaction as a whole can be said to have accrued, arisen or been received in the year of account".

The petitioner's case with regard to the first question is this: He says that as the Rs. 42,000 represents rents which the receiver collected from the tenants of the agricultural lands of the Zamindari this cannot be taxed, income from agriculture being exempt. If the petitioner were the owner of the Zamindari when these moneys were collected there would be force in the contention, but he was not, nor was his family. These moneys were paid into Court by the receiver in reduction of the amount due under the mortgage and the total sum was paid over to the petitioner for this purpose. The petitioner was not even in the position of a usufructuary mortgagee. He

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held a simple mortgage and the title to the estate claimed by him did not vest until after all these moneys had been collected and paid into Court in reduction of the mortgage debt. There is no substance at all in the petitioner's contention here. It has been suggested that the decision of the Privy Council in *Commissioner of Income-tax* v. *Maharajadhiraja of Darbhanga*[1] has application, but this cannot be accepted. That case had reference to a usufructuary mortgage and, as I have already mentioned, the petitioner was never in the position of a usufructuary mortgagee.

The second question also must be answered in favour of the Income-tax authorities. Year by year from 1926-27 until the year of assessment 1937-38 the petitioner was pressing the Income-tax authorities not to take into account any sums received by him on account of this mortgage, but to leave the position open until the matter had been concluded. When the petitioner's agent produced before the Income-tax Officer the accounts in respect of the year 1926-27 it was found that no interest in respect of the loan to the Zamindarini had been debited and it was contended by the assessee that as the loan was the subject-matter of litigation no payment of interest should then be taken into account. This contention was accepted. In the year of assessment 1929-30 the Income-tax Officer discovered that the petitioner had obtained a decree against the Zamindarini, but the Income-tax Officer was induced to stay action by the statement that no execution proceedings had been taken and that when the decretal amount was realized the income thereby received would be accounted for in his books. In the assessment year 1930-31 no accounts were produced for the year of account. The petitioner's agent here represented that proceedings for the recovery of the decretal amount had not been taken and that it would be sometime before any money was realized on the loan. The accounts for the assessment year 1931-32 showed that a sum of Rs. 38,865 had been received in the previous year. The contention then raised was that unless the decretal amount was realised in full no part of the realization could be taken as profit. For the assessment years 1932-33 and 1933-34 the accounts again showed receipts on account of this mortgage. Thereupon the

1. (1935) 69 M.L.J. 474: L.R. 62 I.A. 215: I.L.R. 14 Pat. 623.

Veerappa Chettiar v. Commissioner of Income-tax, Madras.

Leach, C. J.

petitioner's agent represented that there was an understanding between the department and the petitioner that interest should be taken into account only when the entire amount was repaid. On this representation the Income-tax Officer took no portion of the moneys received in these two years as income assessable in those years.

Notwithstanding that the petitioner induced the Income-tax authorities to agree to the assessment being made when the transaction was closed he now says that as the amounts paid to him in cash were received by him more than three years before the year of account they are not assessable to tax. To say the least, it is not an honest contention to put forward in view of the representations made by him from year to year. But without taking into consideration the honesty or dishonesty of the petitioner or the effect of his representations it is clear that he is not entitled in law to escape assessment on the profit which was made out of this mortgage transaction. On his own showing this transaction did not close until the High Court had given its decision in 1936 and therefore it was not until that year profits could properly be calculated. In these circumstances the Income-tax authorities were fully entitled to assess on that basis. The question whether the profit calculated by the department is excessive does not arise in this reference, but the Court has been given to understand that in other proceedings the petitioner intends to challenge the figure arrived at by the Income-tax authorities.

There is one other point which requires to be dealt with. The petitioner says that in any event he should be allowed to deduct the Rs. 42,000 referred to in the first question as that sum was paid into Court in reduction of the Rs. 3,75,000. In raising this point the learned advocate for the petitioner overlooks the fact that under the terms of the compromise decree his client got the whole of the Zamindari plus the Rs. 42,000. The Rs. 42,000 is part of the profit which was made out of the transaction, and therefore no deduction can be allowed.

For the reasons indicated we answer the first question referred in the negative, and the second question in the affirmative. The petitioner must pay the costs of this reference, Rs. 250.

K. S. *Reference answered.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KING.

Al. Sp. Pl. Subramanian Chettiar by his agent Narayanan Chettiar .. *Appellant** (*Petitioner*)

v.

Muthusami Goundan and others .. *Respondents* (*Respondents*).

Subramanian Chettiar *v.* Muthusami Goundan.

Limitation Act (IX of 1908), Art. 182 (5)—*Decree—Revised decree—Execution application based on original decree—Subsequently execution application taken on the revised decree—Applications previously made whether in accordance with law—Whether subsequent execution barred by time*

A decree for money was obtained by the decree-holder *ex parte* against three defendants in 1929. A revised decree was passed in 1930. From 1932 till 1938 execution applications were filed on the assumption that the amount due from defendants was that recorded in the original decree. Upon the sale of the first defendant's property in execution an application was filed by his legal representatives to set aside the sale under O. 21, r. 90, Civil Procedure Code. The decree-holder himself, finding that the properties were sold for an amount larger than was due to himself, sought to set aside the sale. He again filed another execution petition which he based upon the revised decree of 1930. On the questions whether the previous applications were in accordance with law and if not whether the later application was time-barred,

Held, that the applications between 1932 and 1938 should be deemed to have been made in accordance with law within the meaning of Art. 182 (5) of the Limitation Act and therefore the present application was within time.

Palli Vittala Hegde v. Paniyur Hosamane Sheenappa Shetty, (1933) 38 L. W. 877 and *Ram Prasad Singh* v. *Beni Madho Singh*, A.I.R. 1936 Pat. 26, relied on.

Appeal against the order of the District Court of Coimbatore dated 22nd November, 1938, and made in C. A. No. 153 of 1938 preferred against the order of the Court of the District Munsif of Dharapuram dated 17th January, 1938, and made in E. P. R. No. 916 of 1937 in O. S. No. 211 of 1929.

K. V. Ramachandra Aiyar for Appellant.

V. Ramaswami Aiyar for Respondents.

The Court delivered the following

JUDGMENT.—The appellant in this appeal obtained a decree for about Rs. 1600, *ex parte* against three defendants on 1st October, 1929. There was an application by the first defendant only to have this decree set aside and an order was passed in his favour that it would be set aside if he deposited a sum of Rs. 1100 and odd. Some of this money was deposited but not

* A. A. A. O. No.106 of 1939. 10th October, 1940.

Subramanian Chettiar v. Muthusami Goundan.

all and on 27th June, 1930, a revised decree was passed by the Court, in which due notice was taken, in calculating the amount due by the defendants, of the amount which had been so deposited and was to be withdrawn by the decree-holder. The decree-holder subsequently filed a number of execution applications beginning with 1932 and continuing until 1936 and in all these applications, he proceeded on the assumption that the liability of the defendants was that recorded in the original decree. In execution, the first defendant's properties were brought to sale in February, 1937, and an application was filed under O. 21, r. 90, Civil Procedure Code by the guardian of the first defendant's children to set that sale aside. While that application was pending, the decree-holder stated that he discovered that he had had the properties sold for an amount larger than what was due to him; he accordingly, on his own initiative, asked the Court to set the sale aside, and the sale was set aside accordingly. Then comes the application, from which the present appeal arises, made by the decree-holder in July, 1937, for the attachment and sale of the properties of the second and third defendants. In this execution application, the decree-holder, of course, bases his claim upon the revised decree of 1930. Both the Courts below hold that the application is barred by limitation on the ground that the previous applications were not in accordance with law and this is the question which it is necessary to decide in this appeal.

The main reason given by both the Courts for holding that the present execution application is barred is that in the previous applications, the decree-holder applied to the Court to execute not the decree of June, 1930, but the decree of October, 1929, which had no further existence or validity. Put in this way, the argument has some plausibility but the learned advocate for the appellant has been able to show me that in very similar circumstances, such an argument has not found favour with the Courts. My attention has been called to two authorities. The first of these is a decision of a single Judge of the Madras High Court in *Palli Vittala Hegde* v. *Paniyur Hosamane Sheenappa Shetty*[1]. In that case, there was an original decree and an appeal from that decree, the result of that appeal being that the decree was modified and a lesser sum

1. (1933) 38 L.W. 877.

Subramanian Chettiar v. Muthusami Goundan.

was held to be due to the decree-holder. In spite of that modification, the decree-holder applied for execution alleging that the full amount decreed by the first Court was due to him and making no reference to the modification introduced by the decree of the appellate Court. It was held that such an application cannot be said to be one not in accordance with law. The learned Judge says:

"As those petitions were erroneous in particulars, if anybody had taken care to detect the error, the decree-holder should have been required to correct the errors and represent the petition with correct particulars. This not having been done . . . . . . they (the petitions) were dismissed . . . . the omission from the previous execution petitions of the particulars required by Cl. (*d*) and Cl. (*g*) was not sufficient to make them otherwise than in accordance with law."

The second case is reported in *Ram Prasad Singh* v. *Beni Madho Singh*[1]. This is a case of a decree which has not been appealed against but which has been amended and the result of the amendment was that some of the persons who were liable under the original decree were exonerated from liability. In spite of this fact, the decree-holder applied for execution against all the defendants. It was held that such an application was in accordance with law; that an error of this kind was not one of substance but of form and the legality of the execution proceedings should not be allowed to be affected by it. Here, in the present case, it seems to me quite clear that the matter is one not of substance but of form. Though there might have been two decrees one superseding the other and though technically speaking, the second decree is the only one that can possibly be executed, there is only one liability and there has never been any doubt that the judgment-debtors in this case were under liability, as a result of the litigation, to the appellant. The essential facts of the situation are simply that the appellant, it may be owing, as the learned District Munsif puts it, to gross negligence, when he came to Court, has omitted to study the papers connected with the case and is claiming more money than is legitimately due to him. The fact that he supports that claim by putting forward the decree of 1929 seems to me to have no serious bearing on the situation. There were also cited two cases in which it was held that an application by the decree-holder to execute his decree for more than is due to him is not in itself an application not in accord-

1. A.I.R. 1936 Pat. 26.

Subramanian Chettiar v. Muthusami Goundan.

ance with law. In *Ram Gopal Shriram* v. *Ramgopal Bhutada*[1], a shop by owner Pusaram Latchmandas Marwadi, the decree-holder omitted to mention that there was a cross-decree against him and that therefore he could execute his decree only for the balance. *Muthukrishna Raja* v. *Viswalinga Kadavarayan*[2], was a clear case of too much money being claimed. These cases are not quite so directly to the point as *Pallivittala Hegde* v. *Paniyur Hosamane Sheenappa Shetty*[3], and *Ram Prasad Singh* v. *Beni Madho Singh*[4], but they do strengthen the argument for the appellant that this question of claiming more than is due is an irregularity which does not affect the legality of the application. As against these authorities nothing of any value has been cited by the learned advocate for the respondent. The only case which bears remotely on this point is *Appu Rao* v. *Ramakrishna Chettiar*[5], in which the decree of the first Court was confirmed by the appellate Court which also added a decree for costs, but the facts of that case, are essentially different from the facts of this case. For the reasons which I have given, I think that the applications of the appellant between 1932 and 1936 must be deemed to have been made in accordance with law within the meaning of Art. 182 (5) of the Limitation Act and therefore the present application of July, 1937, must be held to be in time. This appeal will therefore be allowed, the order of the District Judge set aside and the execution application restored to file to be disposed of according to law. The respondents must pay all the costs of the appellant, hitherto incurred.

Leave to appeal refused.

K. C. —— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

Venkatranga Reddi v Chinna Sithamma.

Patanjali Sastri, J.

Desayi Venkatranga Reddi and others .. *Appellants** (*Respondents—Defendants*)

v.

Paraku Chinna Sithamma and another .. *Respondents* (*Petitioners*).

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1. (1933) I.L.R. 59 Bom. 1.
2. 1940 M.W.N. 547.
3. (1933) 38 L.W. 877.
4. A.I.R. 1936 Pat. 26.
5. (1901) I.L.R. 24 Mad. 672.

*Appeal Against Order No. 51 of 1939. 31st October, 1940.

Venkatranga Reddi v. Chinna Sithamma.

Execution proceedings—Constructive res judicata *barring judgment-debtor—Sons of such judgment-debtor if also barred.*

An order for execution made after notice to the judgment-debtor who does not appear and offer any objection precludes him from raising a plea of limitation in subsequent proceedings even though the application on which the order was passed does not fructify and is eventually struck off or dismissed.

Lakshmanan Chetty v. *Kuttayan Chetti*, (1901) I.L.R. 24 Mad. 669, followed.

Genda Lal v. *Hazari Lal*, (1935) I.L.R. 58 All. 313 (F.B.), dissented from.

But the sons of the judgment-debtor when proceeded against in execution under the pious obligation theory will not be precluded from pleading the bar of limitation.

Raja Ram v. *Raja Baksh Singh*, (1938) 1 M.L.J. 41 : I.L.R. 13 Luck. 61 (P.C.), followed.

Krishnan Naidu v. *Somi Naidu*, (1940) 1 M.L.J. 363, distinguished.

Appeal against the order of the District Court of Anantapur dated 9th January, 1939 and made in E. P. No. 86 of 1936 in O.S. No. 37 of 1921.

The judgment of the Court was delivered by

Patanjali Sastri, J.—This is an appeal from an order of the District Court of Anantapur overruling certain objections raised by the appellants to the execution of a decree obtained by the respondents and allowing execution to proceed.

Patanjali Sastri, J.

The appellants are members of a Hindu undivided family, the third appellant being the father and the appellants 1 and 2 his minor sons. The decree passed against them directed delivery of possession of certain immoveable properties and payment of a certain sum as mesne profits. The immoveable properties have been delivered and the present execution proceedings relate to the recovery of the mesne profits. Under the decree, these were recoverable from the third appellant personally and from the family properties of all the appellants. There have been numerous applications to execute the decree but none of them has so far proved fruitful owing mainly to the laches of the respondents themselves in the conduct of those proceedings. It is unnecessary, however, to set out all those proceedings for the purposes of this appeal and it is sufficient to refer to one of them, E. P. No. 5 of 1930, instituted against the third appellant alone on 27th January, 1930. It is not now disputed that this petition was barred by time but though notice to show cause why the decree should not be executed was duly served on the third appellant, he did not appear and oppose the

Venkatranga Reddi v. Chinna Sithamma.

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application, and the Court ordered the issue of a warrant for his arrest on 22nd February, 1930. The respondents, however, failed to pay the requisite fee for the issue of the process and the petition was dismissed on 10th March, 1930. There was another application for execution put in 1933 within three years of the previous one and this also having been dismissed for default, the present petition E. P. No. 86 of 1936 out of which these proceedings have arisen was filed on 7th October, 1936. It may be mentioned here that though the appellants 1 and 2 have also been made parties to this petition, it is not disputed that it is barred so far as they are concerned as they were not made parties to the earlier proceedings and indeed the respondents have given up their claim to execute the decree directly against their shares of the family properties. But in answer to the third appellant's plea of limitation, based upon the E. P. No. 5 of 1930 having itself been filed beyond time, the respondents urge that arrest of the third appellant having been ordered on that petition, he is precluded by the principle of *res judicata* from raising the plea, and the first question for determination is whether this contention is correct.

Now, it is well settled that the principle of *res judicata* is applicable to execution proceedings, though S. 11 of the Code of Civil Procedure does not in terms apply (see *Ram Kirpal* v. *Rup Kuari*[1]). But in view of the practice of the Courts, whenever an impediment arises to execution, to dismiss the application allowing the decree-holder to apply again, the question frequently arises as to how far orders passed on previous execution petitions which have been eventually dismissed can be held to preclude parties from raising in subsequent proceedings matters which were not expressly determined by the prior order. After an elaborate consideration of this question, Sulaiman, C.J., laid down in *Ganga Lal* v. *Hazari Lal*[2], certain propositions the last of which is relevant to the present case and has been strongly pressed upon us by learned counsel for the appellants:

> "Where no objection is taken, but the application for execution does not fructify, the judgment-debtor is not debarred by the principle of *res judicata* from raising the question of limitation later."

The learned Chief Justice based this conclusion, apart from certain analogies derived from the application of the

1. (1883) I.L.R. 6 All 269: L.R. 11 I.A. 37 (P.C.).
2. (1935) I.L.R. 58 All. 313 (F.B.).

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Execution proceedings—Constructive res judicata *barring judgment-debtor—Sons of such judgment-debtor if also barred.*

Where a decree for mesne profits had been passed against a Hindu father and his undivided minor sons, directing recovery of the profits from the father personally and from the family properties of all of them, and an application for execution was instituted against the father alone but he did not appear and oppose the application as being time-barred despite notice to him, an order passed on such application will preclude him from raising a plea of limitation in subsequent proceedings, though the application on which the order was passed did not "fructify" and was eventually dismissed.

Lakshmanan Chetti v. *Kuttayyan Chetti*, (1901) I.L.R. 24 Mad. 609. followed. *Genda Lal* v. *Hazari Lal*, (1935) I.L.R. 58 All. 313 (F.B.), dissented from.

In regard to his sons, however, whatever may be the position if the decree had been obtained against the father alone, since in fact the sons had been impleaded in the suit and a decree obtained against their shares, the decree-holder can't claim to proceed against such shares, in execution of the decree against the father, when it can no longer be directly executed against them owing to the bar of limitation.

Raja Ram v. *Ram Baksh Singh*, (1938) 1 M.L.J. 41: 13 Luck. 61 (P.C.), applied.

Krishna Naidu v. *Sami Naidu*, (1940) 1 M.L.J. 363, distinguished.

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The appellants are members of a Hindu undivided family, the third appellant being the father and the appellants 1 and 2 his minor sons. The decree passed against them directed delivery of possession of certain immoveable properties and payment of a certain sum as mesne profits. The immoveable properties have been delivered and the present execution proceedings relate to the recovery of the mesne profits. Under the decree, these were recoverable from the third appellant personally and from the family properties of all the appellants. There have been numerous applications to execute the decree but none of them has so far proved fruitful owing mainly to the laches of the respondents themselves in the conduct of those proceedings. It is unnecessary, however, to set out all those proceedings for the purposes of this appeal and it is sufficient to refer to one of them, E. P. No. 5 of 1930, instituted against the third appellant alone on 27th January, 1930. It is not now disputed that this petition was barred by time but though notice

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to show cause why the decree should not be executed was duly served on the third appellant, he did not appear and oppose the application, and the Court ordered the issue of a warrant for his arrest on 22nd February, 1930. The respondents, however, failed to pay the requisite fee for the issue of the process and the petition was dismissed on 10th March, 1930. There was another application for execution put in 1933 within three years of the previous one and this also having been dismissed for default, the present petition E. P. No. 86 of 1936 out of which these proceedings have arisen was filed on 7th October, 1936. It may be mentioned here that though the appellants 1 and 2 have also been made parties to this petition, it is not disputed that it is barred so far as they are concerned as they were not made parties to the earlier proceedings and indeed the respondents have given up their claim to execute the decree directly against their shares of the family properties. But in answer to the third appellant's plea of limitation, based upon E. P. No. 5 of 1930 having itself been filed beyond time, the respondents urge that arrest of the third appellant having been ordered on that petition, he is precluded by the principle of *res judicata* from raising the plea, and the first question for determination is whether this contention is correct.

Now, it is well-settled that the principle of *res judicata* is applicable to execution proceedings, though S. 11 of the Code of Civil Procedure does not in terms apply (see *Ram Kirpal* v. *Rup Kuari*[1]). But in view of the practice of the Courts, whenever an impediment arises to execution, to dismiss the application allowing the decree-holder to apply again, the question frequently arises as to how far orders passed on previous execution petitions which have been eventually dismissed can be held to preclude parties from raising in subsequent proceedings matters which were not expressly determined by the prior order. After an elaborate consideration of this question, Sulaiman, C.J., laid down in *Ganga Lal* v. *Hasari Lal*[2], certain propositions the last of which is relevant to the present case and has been strongly pressed upon us by learned counsel for the appellants:

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1. (1883) I.L.R. 6 All. 269: L.R. 11 I.A. 37 (P.C.).
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principle to findings in favour of defendants in suits which are eventually dismissed, upon the provisions of sub-rr. (1) and (2) of O. 21, r. 23, read with the definition of "decree" in S. 2, sub-s. (2) of the Code of Civil Procedure. He considered that it was only when the judgment-debtor appeared in response to a notice issued under O. 21, r. 22, that the Court was bound to "consider" his objections and make an order thereon which would be an "adjudication" appealable as a decree, but where the judgment-debtor did not appear at all:

> " a mere order that the decree should be executed which under the sub-rule has to be automatic cannot be regarded as an adjudication of the question as between the decree-holder on the one hand and the judgment-debtor on the other, so as to operate as a bar by implication at all subsequent stages in the same proceedings "

The learned Judge however recognised that where the previous application for execution became "fructuous" by which apparently is meant partial satisfaction of the decree, the judgment-debtor would be precluded from questioning the validity of that application, though we find it somewhat difficult to see how the fructification of a petition can have a bearing on the question of the binding character of an order passed upon it under sub-r. (1) of r. 23. The learned Judge was of opinion that the decision of the Privy Council in *Mungul Pershad Dichit* v. *Grija Kant Lahiri*[1], was not opposed to the view he was adumbrating, observing that it "has, in some cases, been misunderstood."

With all respect, we are unable to concur either in the learned Judge's conclusion or in his view of the effect of the Privy Council decision. O. 21, r. 22, provides for the issue of a notice to the judgment-debtor to show cause "why the decree should not be executed against him" and r. 23 says:

> "(1) Where the person to whom notice is issued under the last preceding rule does not appear or does not show cause to the satisfaction of the Court why the decree should not be executed, the Court shall order the decree to be executed.
>
> (2) Where such person offers any objection to the execution of the decree, the Court shall consider such objection and make such order as it thinks fit."

It will be noticed that sub-r. (1) covers not only cases where the judgment-debtor does not appear in response to the notice or does not offer any objection to execution, but also

1. (1881) I.L.R. 8 Cal. 51: L.R. 8 I.A. 123 (P.C.).

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those where he appears and objects but fails to satisfy the Court that the decree should not be executed. In all such cases, the Court is required to "order" the decree to be executed. That is to say, even in cases where the judgment-debtor appears and "offers any objection to the execution of the decree" and the Court "considers such objection", it has to act under sub-r. (1) if it is not satisfied that the objection is valid. Where such objection is found to be tenable, the Court has to make, under sub-r. (2) "such order as it thinks fit", that is to say, according to the nature and scope of the objection upheld. There is thus no justification for the view that an order under sub-r. (1) "has to be automatic" and that an order under sub-r. (2) alone amounts to an "adjudication" such as would fall within the definition of a decree, and we are unable to see any such distinction as the learned Judge supposed to exist between these sub-rules. If, therefore, the Court's "order" under sub-r. (1) that the decree should be executed is, as it must be held to be, in cases where the judgment-debtor appears and objects but the objections are overruled, an appealable adjudication binding on the parties so long as it is unreversed, it is difficult to see why a similar order under the same provision in cases where the judgment-debtor does not choose to appear in response to the notice duly served on him, should be regarded as not having that effect. It seems to us that there can be no logical difference for this purpose between an application which results in partial satisfaction of the decree and is then allowed to be dismissed, and one which is eventually dismissed without any "fructification". The analogy of a finding in favour of a defendant not operating as *res judicata* when the suit is dismissed is, we venture to think, somewhat misleading. For, in such a case, a mere adverse finding cannot be appealed against and got reversed as the decree, in spite of such finding, is in favour of the defendant, whereas an "order" directing execution to proceed can be appealed from irrespective of the application eventually proving fruitful or infructuous. Again, even an express adjudication on the objections raised by the judgment-debtor must, on the analogy, be held not to be *res judicata* if the application on which execution was ordered to proceed is ultimately dismissed but this has never been suggested to be the case.

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We have examined at some length the reasoning in the full bench case in *Genda Lal* v. *Hasari Lal*[1], out of deference to the learned Judges, but we are of opinion that the point is practically concluded by the Privy Council decision in *Mungal Pershad Dichit* v. *Grija Kant Lahiri*[2]. It is no doubt true, as pointed out by the learned Chief Justice in *Genda Lal* v. *Hasari Lal*[1] that in the case before the Privy Council, the judgment-debtor appeared in the previous execution proceeding in which attachment had been ordered and obtained a stay of the sale, acknowledging the validity of the order for attachment and consenting to its continuance, and that their Lordships rested their conclusion also upon such conduct of the judgment-debtor. But this was not the only ground of their decision. It seems to us that the decision is also based on the conclusiveness of the order for attachment made on the petition of the 8th October, 1874. They observe at page 59:—

"Admitting, for the sake of argument, but only for the sake of argument that the decree was barred when the sixth application was made when the notice was served on the 23rd of September, 1874 and when the petition of the 8th of October, 1874 was presented, and that the Subordinate Judge ought to have dismissed the petition upon the ground of limitation, although it was not set up or relied upon by the judgment-debtor, still his order, though erroneous, was valid, not having been reversed * * * The Subordinate Judge had jurisdiction upon the petition of the 8th October, 1874 to determine whether the decree was barred on the 8th October, 1874, and he made an order that an attachment should issue. He, whether right or wrong, must be considered to have determined that it was not barred. A Judge in a suit upon a cause of action is bound to dismiss the suit, or to decree for the defendant, if it appears that the cause of action is barred by limitation. But if, instead of dismissing the suit, he decrees for the plaintiff, his decree is valid, unless reversed upon appeal; and the defendant cannot, upon an application to execute the decree, set up as an answer that the cause of action was barred by limitation".

These passages clearly indicate that the decision proceeded on the principle of *res judicata* as well, and it has been so understood by almost all the High Courts in India: see *Sheoraj Singh* v. *Kameshar Nath*[3], *Mora Joshi* v. *Ramchandra Dinker Joshi*[4], *Coventry* v. *Tulshi Pershad Narayan Singh*[5], *Lakshman Chetti* v. *Kuttayan Chetti*[6], *Lakshmanan Chetty* v. *Palaniappa Chetti*[7], *Jago Mahton* v. *Khirodhar Ram*[8]. We are unable to

1. (1935) I.L.R. 58 All. 313 (F.B.).
2. (1881) I.L.R. 8 Cal. 51: L.R. 8 I.A. 123 (P.C.).
3. (1902) I.L.R. 24 All. 282.
4. (1890) I.L.R. 15 Bom. 24.
5. (1904) I.L.R. 31 Cal. 822.
6. (1901) I.L.R. 24 Mad. 669.
7. A.I.R. 1928 Mad. 1052.
8. (1923) I.L.R. 2 Pat. 759.

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agree that the decision in *Mungal Prasad Dichit* v. *Grija Kant Lahiri*[1] has been "misunderstood" in all these cases. See also *Raja of Ramnad* v. *Velusami Tevar*[2] where their Lordships applied the same principle where in a previous order for execution the plea of limitation that was raised was not specifically dealt with. We are therefore of opinion that an order for execution made after notice to the judgment-debtor who does not appear and offer any objection precludes him from raising a plea of limitation in subsequent proceedings even though the application on which the order was passed does not fructify and is eventually struck off or dismissed. We may observe that a Bench of two Judges in *Lakshmanan Chettiar* v. *Kuttayan Chetti*[3] has taken the same view on facts more or less similar to those of the present case, and so far from being convinced by the strenuous argument of the appellants' learned counsel that the decision requires reconsideration, we are inclined to agree with it.

A further contention has been put forward on behalf of the sons, the appellants 1 and 2. Assuming that the plea of limitation is not open to their father (the third appellant) and the decree could be executed against his interest in the family properties, their shares in such properties, it is urged, should be exonerated as it is not disputed that the decree is time-barred so far as they are concerned. The learned Judge in the Court below, while recognising that the decree against the sons could not be executed as such, took the view that the decree being executable against the father, the sons' shares were liable to be proceeded against in such execution by reason of their pious obligation under the Hindu Law to discharge the father's decree debt, and the learned counsel for the respondents has attempted to support this conclusion before us.

This somewhat archaic rule of pious obligation is no doubt firmly established in Hindu Law although the religious notions on which it is founded have ceased to command general acceptance at the present day, as could be seen from this case where the sons as well as the father, unmindful of the evil consequences which the rule is intended to avert, resist the claim of the creditor, while the latter would apparently rescue them from their

1. (1881) I.L.R. 8 Cal. 51: L.R. 8 I.A. 123 (P.C.).
2. (1920) 40 M.L.J. 197: 48 I.A. 45 (P.C.).
3. (1901) I.L.R. 24 Mad. 669.

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doom by enforcing the pious duty. But decisions regarding the scope and incidents of this obligation are by no means uniform. It is, however, generally recognised that the liability of a son does not extend to the payment of the time-barred debts of the father (see *Subramania Aiyar* v. *Gopala Aiyar*[1] and Mayne's Hindu Law, 10th Edition page 421). It is therefore argued for the appellants 1 and 2 that they are not liable as the decree is really barred even against their father, though the latter is personally estopped by the principle of *res judicata* from showing this; while the respondent broadly maintains that so long as the decree is capable of execution against the father, the pious obligation of the sons to discharge the decree debt out of the family properties remains and can be enforced. We are relieved from the necessity of deciding this interesting question of Hindu Law which is not altogether free from difficulty, as, whatever might be the position if the decree had been obtained against the father alone, we are of opinion that, the respondents having impleaded the sons also in the suit and obtained the decree against their shares in the family estate, cannot claim to proceed against such shares in execution of the decree against the father, when it can no longer be executed directly against them owing to the bar of limitation. It is true that the liability of a son arising out of his pious obligation is distinct from that of his father though arising out of the latter's debt, and can be enforced against him by executing a decree obtained against the father alone against the entire family estate including the son's interest therein, provided of course that the debt is neither illegal nor immoral. But when the son is joined in the suit and a decree is obtained binding his interest also, the claim against him based upon his obligation must necessarily be deemed to have been put in suit and merged in the decree, and the only mode of enforcing such claim is, as it seems to us, by executing the decree against him. The matter is no longer governed by the Hindu Law but by the relevant provisions of the Code of Civil Procedure. In *Raja Ram* v. *Raja Baksh Singh*[2] the Privy Council had to consider a case where a suit brought by a creditor against the undivided sons and grandsons of a deceased Hindu debtor was dismissed against the grandsons, and their Lordships held that the decree could not be executed

1. (1909) 20 M.L.J. 633: I.L.R. 33 Mad. 308.
2. (1938) 1 M.L.J. 41: 13 Luck. 61 (P.C.).

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against their interests in the family property. Their Lordships observed at page 63:

"If the debt in question was not contracted for purposes regarded as immoral by the Hindu Law, and if the respondents being grandsons of Badri Singh were liable therefor to the extent of their interest in the joint family property, then the Subordinate Judge's decree of 13th May, 1931, was erroneous. The appellant should have appealed therefrom, claiming that, instead of dismissing the suit as against the respondents, the Subordinate Judge should have given a decree against them in like manner as against defendants 1 to 3, namely, as representatives of Badri Singh for a sum to be realised out of any property of Badri Singh come to their hands".

Similarly, we apprehend, where the creditor's suit is decreed also against the son, the decree must rule. It follows that if such decree is allowed to become barred against the son, the creditor will no longer have any remedy, so far as the son's interest in the family property is concerned.

This Court has no doubt held in *Periasami Mudaliar* v. *Seetharama Chettiar*[1] that a decree obtained against a father creates by its own force a debt against him which his sons are under a pious obligation to discharge and a suit can be brought against the sons to recover the decree debt within six years of the decree against the father. But the decision clearly envisaged cases where a decree was obtained against the father alone, and, the father being dead and the decree not being executable against the family properties according to the view taken by this Court under the old Code, the creditor was held entitled to file a suit against the sons on the decree debt within six years from the date of the decree although a suit on the original debt might be barred. Where, however, the sons were impleaded in the suit against the father and there has been an adjudication as to their liability, it has never been held that another suit would lie against the sons on their pious obligation to pay the *decree debt* of the father. Obviously, it cannot lie where a decree against the sons has been refused. The same, we conceive, must be the case where a decree has been passed against them. If such a decree is allowed to become time-barred as against the sons, the creditor cannot, it seems to us, in executing the decree against the father attach and bring to sale the entire interest of the family as the father in such proceedings can no longer represent the sons who are judgment-debtors in their own names. The position would of course be different if the creditor had sued

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1. (1903) I.L.R. 27 Mad. 243: 14 M.L.J. 84 (F.B.).

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the father alone. It that case, as we have already observed, he could bring the family properties to sale including the interests of the sons who would be represented by their father and who could only sue either for a declaration that their shares are not liable to be sold, or for recovery of such shares after they are sold, by showing that the debt was illegal or immoral, or, according to some decisions, did not in fact exist (see *Lakshmudu* v. *Ramudu*[1]).

Learned counsel for the respondents has strongly relied upon a recent decision of this Court in *Krishna Naidu* v. *Sami Naidu*[2] where in a suit on a promissory note executed by a father his sons were also impleaded on the ground that the debt was incurred for family necessity, but in the appeal, the plaintiffs decided not to ask for a decree against the sons who were dismissed from the suit, and obtained a decree against the father alone. In the execution proceedings that followed, the sons objected that having been dismissed from the suit, they could not be held liable for their father's debt. The learned Judges (the Chief Justice and Krishnaswami Ayyangar, J.) held that the dismissal of the suit against the sons did not prevent the decree-holder executing the decree against the sons' interests in the family property. It is argued for the respondents that, if a creditor can proceed against the sons' interests in the family estate in execution of a decree obtained against the father even when his suit has been dismissed against the sons, he cannot be in a worse position where the suit has been decreed against the sons and the decree against them has become time-barred. If the principle of *res judicata* does not apply in the one case, it cannot, it is said, apply in the other. This argument seems to us to proceed upon a misconception of what was decided in the case referred to above. We do not understand the case as deciding that if in a suit against a father and his sons, the sons are found not to be liable in respect of the debt sued upon and the suit is dismissed as against them, the creditor can, in executing the decree against the father, proceed nevertheless against the interests of the sons, as such a conclusion would be plainly contrary to the principle of *res judicata*. On the other hand, the statement in the judgment that "in the District Court the appellants decided not to ask for a decree against the sons

1. I.L.R. (1940) Mad. 123. 2. (1940) 1 M.L.J. 363.

Venkatranga Reddi v. Chinna Sithamma.

Patanjali Sastri, J.

who were dismissed from the suit". would rather seem to indicate that the learned Judges were dealing with a case where the plaintiffs chose to withdraw the case against the sons, and proceeded with it only against the father. That the learned Judges placed reliance upon the decision in *Periasami* v. *Vaidhyalinga Pillai*[1], further supports this view. That was clearly a case where the creditor withdrew the suit against the sons and Varadachariar, J., who delivered the judgment of the Court pointed out the distinction between a withdrawal of a suit against the sons and its dismissal against them on the merits. The other case relied upon in the judgment of the learned Chief Justice namely *Doraiswami* v. *Nagasami*[2], was also, presumably, one where the suit was withdrawn against the sons. The facts are not stated in the report and the judgment in that case merely refers to the "exoneration" of the sons. We are therefore of opinion that the observation in *Krishna Naidu* v. *Sami Naidu*[3], namely:

> "a decree was passed against the father after the sons had been dismissed from the suit, and the passing of the decree gave to the decree-holders a new right, which they could enforce against the sons",

must be understood with reference to the facts of the case and as applicable only to cases where the creditor's suit against the sons is dismissed as withdrawn without any adjudication, either express or implied, on his claim against them.

In the result, the appeal is allowed so far as appellants 1 and 2 and their shares in the family properties are concerned, and the order of the Court below directing execution to proceed is modified by restricting it to the share of the third appellant in the family properties. The appellants 1 and 2 will have their costs here and in the Court below and the respondents will have the costs of this appeal from the third appellant.

K.S. *Order modified.*

[*K. Srinivasa Rao* for Appellants. *P. Basi Reddi* for Respondents.]

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1. (1937) 47 L.W. 60.
2. A.I.R. 1929 Mad. 898.
3. (1940) 1 M.L.J. 363.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Appellate Jurisdiction.]

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE HORWILL.

The Nedungadi Bank, Limited .. *Appellant** (*Plaintiff*)

v.

Doraikannu Ammal .. *Respondent* (*Defendant*)

Surety—Mortgage by surety for overdraft current account of principal—If discharged by earliest payments by principal debtor—Rule in Clayton's *case—Applicability.*

Where on the facts, it is found that a mortgage by a surety is a continuing guarantee enforceable in respect of the ultimate balance due on an overdraft current account, the rule in *Clayton's case*, (1816) 1 Mer. 572: 35 E.R. 781, is not applicable and the mortgage by the surety cannot be deemed to have been discharged by the earliest payments made by the debtor.

Nedungadi Bank, Ltd. *v.* Doraikannu Ammal.

On appeal from the judgment and decree dated 4th August, 1939, of the Honourable Mr. Justice Venkataramana Rao passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in C. S. No. 67 of 1936.

K. Rajah Aiyar, V. C. Veeraraghavachariar and *P. S. Ramaswami Aiyangar* for Appellant.

C. Padmanabha Aiyangar and *T. V. Ramanathan* for Respondent.

The judgment of the Court was delivered by

Leach, C. J.

The Chief Justice.—Admittedly the only question which arises in this appeal is whether the respondent gave a continuing guarantee to the appellant bank. The respondent is the wife of one A. Murugesa Mudaliar, an army contractor and merchant carrying on business in Madras. On the 5th May, 1926, for the purpose of this business, Murugesa Mudaliar opened a current account with the appellant and it was arranged that he should be allowed to overdraw it at any one time to the extent of Rs. 18,000 provided that the respondent deposited with the appellant the title deeds of a house belonging to her in Varadamuthiappan Street, Madras, as security for the overdraft. The respondent was to be surety for her husband for this amount and to furnish security. The respondent admittedly deposited the title deeds with the bank on this footing. Her husband paid in and withdrew considerable sums of money, but he did not exceed the limit of

* O. S. A. No. 47 of 1939. 2nd September, 1940.

Nedungadi Bank, Ltd. v. Doraikannu Ammal.

Leach, C. J.

Rs. 18,000. On the 17th February, 1927, the overdraft stood at Rs. 17,693-14-10, or allowing for further interest which had accrued due a little less than Rs. 18,000. At this stage Murugesa Mudaliar wanted further finance and the appellant agreed to allow him to overdraw to the extent of Rs. 25,000, provided that his wife executed a legal mortgage in respect of the house. In other words, instead of an equitable mortgage for Rs. 18,000 there was to be a legal mortgage for Rs. 25,000. The respondent was agreeable to this course and on the 17th February, 1927, she executed a legal mortgage in favour of the appellant for Rs. 25,000. In the deed it was recited that the respondent had already created an equitable mortgage over the property in favour of the appellant, that the appellant had already advanced the sum of Rs. 18,000 on the security of the equitable mortgage for the purpose of Murugesa Mudaliar's trade, that Rs. 7,000 more was required by him for this purpose and that the respondent had agreed to execute a mortgage deed for the consolidated sum of Rs. 25,000 carrying interest at 9½ per cent. per annum. The mortgage deed then proceeded:

"This Indenture witnesseth that in consideration of the consolidated sum of Rs. 25,000 (Rupees Twenty-five thousand) which the mortgagor doth hereby acknowledge her liability to pay to the mortgagee, the mortgagor doth hereby covenant with the mortgagee to pay back to the mortgagee on demand being made the whole of the said sum of Rs. 25,000 with interest at 9½ per cent. per annum, or any amount for the time being owing and due to the mortgagee from the mortgagor on the footing of these presents with interest thereon at 9½ per cent. per annum without claiming any deduction or abatement whatsoever for any reason as aforesaid."

Between 18th February, 1927 and 24th February, 1927, Murugesa Mudaliar paid into his account various sums which had the effect of reducing his overdraft to Rs. 14,220-8-2. After that there were drawings and payments in. The state of the account fluctuated, but it was always at debit and on the 27th December, 1931, the account was overdrawn by Rs. 19,482-8-9. The suit out of which this appeal arises was filed on the 26th February, 1936, to recover from the husband and the wife the sum of Rs. 15,259-6-11, the debit balance of that date. The suit was defended and the pleas raised were that the defendants had not been given credit for certain sums of money to which they were entitled, that the suit was bad for misjoinder of parties and causes of action and that it was barred by the law of limitation. The respondent did not plead that her guarantee was not a continuing one and that the

rule in *Clayton's case*[1] applied. This contention was, however, raised during the hearing of the case and was accepted by the learned Judge (Venkataramana Rao, J.) as freeing the respondent from all liability. Consequently he passed a decree against her husband for Rs. 17,350-6-11 with costs, but dismissed the suit with costs as against her. In holding that the respondent was not liable the learned Judge had regard merely to the wording of the deed of mortgage of the 17th February, 1927. He considered that there was no evidence of any intention that the respondent's guarantee should be a continuing one and that in these circumstances he was bound to give effect to the rule in *Clayton's case*[1]. It is common ground that if the rule in *Clayton's case*[1], does apply, the mortgage debt was discharged by the 31st March, 1927.

With great respect for the opinion of the learned Judge we are unable to agree that there is no evidence on the record from which it can be concluded that there was here a continuing guarantee. The authorities indicate that in deciding such a question the whole of the surrounding circumstances must be taken into consideration unless the wording of the guarantee is such that the Court is precluded from taking anything else into consideration. The account was opened and Murugesa Mudaliar allowed to overdraw it on the condition that the respondent provided security for any sums which might be drawn from time to time by him not exceeding Rs. 18,000 and when he wanted further accommodation from the appellant, the appellant agreed to give it on the security of the respondent's house provided that a legal mortgage was substituted for the equitable mortgage. The banking account was placed on no different basis when the limit of the overdraft was increased to Rs. 25,000. The security provided was for the total sum of Rs. 25,000 with interest or any amount for the time being owing and due to the appellant from the respondent "on the footing of these presents", the deed referring specifically to the husband's overdraft. On behalf of the respondent it is conceded that when the overdraft account was secured by the equitable mortgage the respondent's guarantee was a continuing one. The appellant would certainly not have agreed to free the respondent from her continuing guarantee. The very nature of the account would preclude this. Nor is it feasible to suppose that the respondent thought her

1. (1816) 1 Mer. 572: 35 E.R. 781.

Nedungadi Bank, Ltd. v. Doraikannu Ammal.

Leach, C.J.

position was in any way being altered, apart from the increase in the amount of her guarantee. The respondent has not ventured in the witness-box to support the case advanced on her behalf and the fact that there is no averment in her written statement based on the rule in *Clayton's case*[1] is not without significance.

Now what do the authorities say? In *Heffield* v. *Meadows*[2], the Court of Common Pleas had to consider whether there was a continuing guarantee where a document had been given in these terms:

"I, John Meadows, of Barwick in the County of Northampton, will be answerable for 50*l.* sterling that William York, of Stamford, butcher, may buy of Mr. John Heffield, of Donington."

It was held that the guarantee was a continuing one. Willes, J., said:

"It is obvious that we cannot decide that question upon the mere construction of the document itself, without looking at the surrounding circumstances to see what was the subject-matter which the parties had in their contemplation when the guarantee was given. It is proper to ascertain that for the purpose of seeing what the parties were dealing about, not for the purpose of altering the terms of the guarantee by words of mouth passing at the time, but as part of the conduct of the parties, in order to determine what was the scope and object of the intended guarantee."

After considering the facts Willes, J., observed:

"For these reasons, I am of opinion that the guarantee in question is a continuing guarantee, as well upon the authorities as upon the common-sense view of the matter."

Montague Smith, J., said:

"The consideration is defectively stated in this guarantee. It does not shew in what the supply is to consist. We may, therefore, look at the surrounding circumstances, in order to see for what it was given and to what transactions or dealings it was intended to apply,—not to alter the language, but to fill up the instrument where it is silent, and to apply it to the subject-matter to which the parties intended it to be applied."

In *Henniker* v. *Wigg*[3], Lord Denman, C.J., held that there was a continuing guarantee when the condition of a bond was simply for the repayment of £1,000 with interest on or before the 6th April, 1837, the bond itself bearing the date 10th January, 1837. It was pointed out that the precise nature of the agreement at the time the bond was given did not appear distinctly, but taking into consideration the conduct and language of the defendants or some of them, the Court came to

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1. (1816) 1 Mer. 572: 35 E.R. 781. 2. (1869) L.R. 4 C.P. 595.
3. (1843) 4 Q.B. 792: 114 E.R. 1095.

Nedungadi Bank, Ltd. v. Dorai-kannu Ammal.

Leach, C.J.

the conclusion that there was no doubt that the bond was intended to be a continuing guarantee for advances made by a bank.

A document in these words "the within warrant of attorney is given to secure the payment of the sum of £4,000 with lawful interest thereon" was held to be a continuing guarantee in *Woolley* v. *Jennings*[1], because there was nothing on the face of the warrant of attorney or the defeasance to show that it was intended to secure the balance existing at the time when it was given. In the absence of anything to show such an intention, it was held that it must be construed as a continuing security.

The judgment of Knight Bruce, Vice-Chancellor, in *Melland* v. *Gray*[2] also contains some apposite remarks so far as the present case is concerned. In that case a son executed a bond in favour of his father for £845. In the following year he executed another bond for £1,200 and on the same date he created a mortgage in favour of his father for the amount of the bond. The Vice-Chancellor said:

"Looking at the position in which the father stood towards his only son, a young man just entering the Army and requiring a provision—looking at the character of the securities, and the many observations which occur with reference to the frame of the mortgage deed, perhaps answered in some degree by Mr. Wigram, but still important when coupled with this, that the father lived more than 15 years after the latter security, and there is no evidence of any demand made upon either security or of any interest having been paid or demanded, the son having been wholly during that time maintained by the father—the probability, and I think I may say the fair inference, is that the bond for £1,200 was rather meant as a running security, than as an absolute bond for that amount."

The wording of the mortgage deed executed by the respondent does not preclude the Court inquiring whether there is here a continuing guarantee. When the facts are examined and the probabilities considered in our opinion the only conclusion consistent with common-sense is that the respondent gave this mortgage as a continuing security for her husband's liability on his overdraft account, limiting of course her own liability to the amount stated in the mortgage deed.

Mr. C. Padmanabha Aiyangar has pressed upon us *Kirby* v. *The Duke of Marlborough*[3] and *Walker* v. *Hardman*[4], but

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1. (1826) 5 B. & C. 165: 108 E.R. 61.
2. (1843) 2 Y. & C.C.C. 199: 63 E.R. 87.
3. (1813) 105 E.R. 289.
4. (1837) 7 E.R. 99.

Nedungadi Bank, Ltd. v. Doraikannu Ammal.

Leach, C.J.

when examined these cases differ greatly from the one now before us. In the first of these two cases the bond was obviously one which was limited to a specific advance of £3,000 and was not a guarantee of any running account. In the second case the Court expressly found that there was no evidence on which it could be held that the bond was given as security for floating balances. In the present case there is in our opinion ample evidence to support such a conclusion.

For the reasons given the appeal will be allowed with costs to the appellant throughout. The interest allowed will not, however, be the interest allowed against the respondent's husband. As far as the respondent is concerned the interest will be on the basis of the mortage deed, namely, at 9¾ per cent. per annum up to the date fixed for redemption, that is, six months from to-day. As the appeal has been valued at only Rs. 13,039-6-11 the decretal amount will not exceed this sum except for interest at the contract rate between the date of the filing of the plaint and the date fixed for redemption.

K. S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PANDRANG ROW AND MR. JUSTICE ABDUR RAHMAN.

Karnam Ramamma and another .. *Appellants* (Defendants 2 and 3)*

v.

Peddineni Venkatalakshmamma and others. *Respondents (Plaintiff-Defendants 1 and 4 to 6)*

Ramamma v. Venkatalakshmamma.

Hindu Law—Will—Construction—Bequest to 'my daughter R *and* S *my illatom son-in-law'—Death of* S *unmarried—Effect—*S *whether* persona designata*—Intended son-in-law if covered by words 'illatom son-in-law'.*

A will recited that the testator had brought to his house his sister's son *S* with a view that a marriage may be celebrated between *S* and the testator's daughter *R* and that *S* and *R* might become entitled to and enjoy the movable and immovable properties of the testator. The will then provided: "Out of the remaining movable and immovable properties owned by me, my daughter *R* and my illatom son-in-law *S*, shall after my lifetime enjoy with absolute rights two shares out of the four shares." *S* having died unmarried and *R* having married another the question arose whether the

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* Appeal No. 340 of 1937. 29th April, 1940.

Ramamma v. Venkatalakshmamma.

bequest to S was as *persona designata* or whether the marriage between S and R was a condition precedent to the bequest becoming effective.

Held, construing the will as a whole it would appear that the testator was making a bequest not to his sister's son S as such, but to his illatom son-in-law S along with his daughter on condition that they were married.

The expression "an illatom son-in-law" cannot be taken to cover in all cases an intended son-in-law.

Observations of *Ramesam, J.*, in *Venkatakrishnayya* v. *Uddamma*, (1927) 28 L.W. 869, explained and distinguished.

Appeal against the decree of the Court of the (Additional) Subordinate Judge of Nellore in O. S. No. 22 of 1935.

V. V. Srinivasa Aiyangar, V. V. Ramadurai, P. Chandra Reddi and *R. Ramalinga Reddi* for Appellants.

R. Sethurama Sastri for Respondents.

The judgment of the Court was delivered by

Abdur Rahman, J.

Abdur Rahman, J.—The main question to decide in this appeal is one of construction of a will executed by one Veerappa Naidu, a Kamma of Nellore. What we have to ascertain is whether the testator's intention was to bequeath a share of his property to a designated person (*persona designata*) Sankariah, who happened to be his sister Venkatalakshmamma's son or whether Sankariah's marriage with the testator's daughter Ramamma, the second defendant, was a condition precedent without which the bequest was not to take effect. The will was executed on the 27th April, 1923, and the testator died two days later. Sankariah died before his marriage on the 22nd June, 1925, leaving his mother as his heir. He was about 13 years old then. Ramamma was subsequently married to Gopal Naidu, the third defendant in the suit. Venkatalakshmamma brought the suit out of which this appeal arises for recovery of the share bequeathed by her brother Veerappa Naidu to her son Sankariah under the will Ex. A.

The relevant portions of the will are as hereunder:

"I am now ill in body and apprehend that I may not live. As I have no male issue and as I have a female issue by name Ramamma, I have brought to my house five years ago Peddineni Sankariah son of my own uterine sister Venkatalakshmamma and I have been keeping him in my house and giving him education *with a view that a marriage may be celebrated by giving my daughter to him and that these two might become entitled to and enjoy the movable and immovable properties specified therein.* I have kept him as the huqdar for the office of the Village Munsif in Vasilli held by me and kept him as illatom......Out of the remaining movable and immovable properties owned by me, my daughter Ramamma and my illatom son-in-law, Sankariah, shall, after my lifetime, enjoy with absolute right two shares

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out of the four shares. I have arranged the said Sankariah shall have a right to the post of Village Munsif of Vasilli Village which belongs to me. My wife, my own mother and father shall retain in their possession the other two shares, bring and keep in our house my wife's brother Gola Narasiah, give my uterine younger sister Venkamma (another sister) in marriage to him and the said Gola Narasiah shall, after the lifetime of my father and mother, have a right to one share. The other one share shall, after the lifetime of my wife Lakshmamma, pass to my daughter and son-in-law. She shall be in enjoyment of them till then."

The question to decide is, as we have stated in the beginning, whether Veerappa intended to bequeath two shares mentioned in the portion marked A-1 to his daughter Ramamma or to his sister's son Sankariah irrespective of the fact whether they were married to each other or not. In the portion of the will marked A-2, another share was bequeathed by Veerappa to his daughter and to his son-in-law on the happening of a contingency, that is, of his wife's death. It would be noticed that in the latter portion of the will (A-2) Sankariah has not been mentioned by name while his name was specifically mentioned in the portion marked A-1. There is no doubt however that the reference in both places in the will is to the same person. No exception can also be taken to the argument that if the property devolved on Sankariah at the time of the testator's death, Sankariah and Ramamma would not take the two shares as joint tenants, there being no right of survivorship as between them, but merely as tenants in common and that their shares would be in the absence of any direction to the contrary equal. The answer to the questions whether the bequest to Sankariah was to take effect on his marriage with Ramamma or whether it was contingent on his marrying Veerappa's daughter would depend on the fact whether Sankariah was described as an illatom son-in-law for purposes of identification merely or whether the existence of relationship of an illatom son-in-law was regarded by Veerappa to be a condition precedent without which the bequest could not be held to be operative. If the testator's intention is found to be that Sankariah should take the bequest only in his character as illatom son-in-law, the bequest must be held to fail as the presumed condition on which Veerappa wanted Sankariah to take the bequest will not be found to exist. To ascertain that intention we must now examine the relevant portions of the will which we have already quoted *in extenso*.

The first portion of the will is, in our opinion, extremely significant and leaves no dubt that the 'two' (Sankariah and

Ramamma) were intended by the testator to be 'entitled to and enjoy the movable and immovable properties specified herein' after his daughter's marriage was 'celebrated' with Sankariah. This would clearly show that the testator was only trying to provide for this couple in the event of their being married to each other and if by any chance the marriage was not celebrated or became impossible of performance, the legacy was not intended to take effect. Our reading of the will leads us to the conclusion that the testator did not visualise the possibility of these two not being married and did not provide for the contingency that arose on account of Sankariah's death before his marriage. If the actual words of bequest in the will, which have been marked by us as A-1 are read with what was stated in the beginning of the will, it would appear that Veerappa was making a bequest not to his sister's son Sankariah as such, but to his illatom son-in-law Sankariah along with his daughter. That is why he referred to the enjoyment of two shares by both of them with absolute rights after his lifetime. In other words, the will was providing for the person who was to marry his daughter and not for Sankariah in any other capacity. The bequest was not made to Sankariah, who might become his illatom son-in-law later but to his illatom son-in-law that Sankariah was expected to be. This means that the illatom son-in-law was not a mere description of Sankariah but that the property was meant to be given to the prospective son-in-law in his capacity as a son-in-law and not to Sankariah in his individual capacity.

Ramamma *v.* Venkata-lakshmamma. — Abdur Rahman, J.

It is true that Sankariah was mentioned at one place in the will as an illatom son-in-law; but he would have been so if he would have married Ramamma and not before. The object of putting it in that manner was another way of describing the certainty which the testator felt about the marriage as if it had already taken place and Sankariah had already become his son-in-law. The contention raised before us by learned counsel for the respondent that Sankariah was an illatom son-in-law even before his marriage with Ramamma has no force. It is true that illatom adoption is of secular nature and has no religious significance but it must not be overlooked that it is brought about with the object of securing the adoptee's assistance in the management of the property, usually agricultural, belonging to the father whose daughter he (the adoptee) either marries or

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intends so to do and cannot be considered to be complete unless the marriage has actually taken place. The time that the would-be son-in-law spends in his future father-in-law's house may be regarded as a period of probation and it is only when nothing untoward happens in the meantime or nothing is discovered which may lead him (i.e., the prospective father-in-law) to consider the boy as an unsuitable husband that the marriage takes place. Before marriage, he can be asked to go away and there is no obligation so far as we know, customary or moral, on the adoptive father to do anything for the boy whom he intended to adopt in that form. What would happen if either the boy or the girl happens to die and the marriage becomes impossible? It cannot be reasonably suggested that the status of the son who was intended to be adopted in that form could be in the event of the girl's death regarded to have undergone any change before the marriage.

A great deal of stress was laid by learned counsel for the respondent on the fact that according to custom the boy could be married even subsequent to his adoptive father's death and that he would be called even before marriage, in common parlance, an illatom son-in-law. But we cannot see how these assertions, even if correct, could really help his case. If a boy brought by the father to his house during his lifetime and kept therein with the object of marrying his daughter did not happen to marry her during her father's lifetime, but married her after his death, he would still be a son-in-law of the deceased since the deceased had brought and kept him in his house with the object of giving his daughter in marriage. If the boy continued to live in that house after marriage and carried on the management of his father-in-law's property which was the real object of the adoption, the boy must be taken to have done all that he was expected to do and there could be no difference in his status on account of the fact that the marriage was not performed before his wife's father's death.

Nor is the fact that a boy is called an illatom son-in-law before his marriage of any importance. He is really an illatom son-in-law designate before the marriage and if he is called as such before he is married to the girl with whom his marriage is intended to be performed, we take it that this is a courtesy title alone and is given in anticipation of the marriage, which is more or less regarded to be a certainty.

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We have tried to show that in this particular case on a proper construction of the will the bequest to Sankariah and to Ramamma must be held to have been made on the condition that they were married. They could not have enjoyed the property jointly before their marriage and it was this joint enjoyment which was, as we read the will, intended to be expressed by the testator in more than one place. If the marriage could not be performed for any reason whatsoever, the provisions of the will could not be held to apply and there would be an intestacy so far as the shares that were intended to be given to these two were concerned. If Ramamma gets any share or property of her father subsequently, she would not do so under the will but on account of the provisions of Hindu Law.

Learned counsel for the respondent placed reliance on certain English and Indian decisions but they are not, in our opinion, applicable to this case. The first case on which reliance was placed was a decision of their Lordships of the Privy Council in *Ramakrishna Rao Bahadur* v. *The Court of Wards*,[1] commonly called the First Pithapore case. The bequest in that case was made to a person whom the testator was alleged to have falsely described as his aurasa or natural born son. This description was not considered by their Lordships to involve any condition that the legatee should be the testator's natural son in fact and the bequest having been found to be in favour of a designated person was not regarded to be invalid even when the legatee was assumed not to be the testator's son. After considering the various clauses in the will their Lordships arrived at the following conclusion:

"Their Lordships are of opinion that there is a gift by the will to the second respondent and that the false description which must at present be assumed does not vitiate it."

The next decision which was cited on behalf of the respondent was that of *Subbarayar* v. *Subbammal*.[2] In the will which came up for construction before their Lordships of the Privy Council in this case it was admitted by the testator in the beginning of the will that he had been keeping a minor as an adopted son and protecting him for the last three years. Later on in the will the boy was referred to as an adopted son; but the bequest was not, as would be seen from the words in

1. 9 M.L.J. Sup. 1: 26 I.A. 83 (P.C.): (1899) I.L.R. 22 Mad. 383.
2. (1900) L.R. 27 I.A. 162: I.L.R. 24 Mad. 214 (P.C).

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the will, conditional on his adoption. The relevant passage in the will read as follows:

"Whereas I, having no issue, have been keeping Venkataramanayyar, a minor aged about ten, son of Venkatadasappayya ...... who is my brother-in-law, as adopted son and protecting him for the last three years, whereas I am now seriously ill, whereas my mother Venkalakshmi Ammal is in her dotage, and whereas my adopted son the said Venkataramanayya is a minor and consequently incapable of managing the said properties and of protecting us, my wife Subbammal shall, until the said minor becomes a major, administer the said properties as guardian of the said minor. . . . . . Afterwards the said minor on his attaining majority shall take charge of the said properties. . . . and after the said Subbammal's life time he shall perform her funerals etc., and possess and enjoy with all rights the said properties etc., from generation to generation so long as the sun and moon last......"

In view of the words in the will it was assumed by their Lordships in coming to a decision, that the boy was not adopted. But construing the will, their Lordships expressed their opinion in the following words:

"It appears to their Lordships that the gift to the minor is not conditional on adoption. The testator no doubt refers to the minor as his adopted son, but he explains what is meant by that expression by stating that he had been keeping the minor 'as adopted son' that is with a view to his adoption."

This case renders no assistance to the respondent. It was relied upon because in that case the minor, although not an adopted son, was described in one place as such. But that was explained by their Lordships from what was contained in the will itself. It would be noticed that the bequest was in favour of the minor and not in favour of the adopted son. Moreover, there was nothing in the will from which it could be inferred that the bequest was contingent on the adoption.

The next case brought to our notice was that of *Suryadevara Venkatakrishnayya* v. *Vasi Reddi Udamma*,[1] where in construing a will which was to the following effect:

"that to the said properties and to my assets, liabilities, my daughter Subbamma and my sister's son shall be the 'karthas' (heirs entitled) and they shall be discharging the debts from out of the income of the lands and be supporting my mother and wife,"

a Division Bench of this Court consisting of Sir Murray Coutts Trotter, C. J., and Mr. Justice Ramesam held that the gift to Subbayya was not conditional upon his marrying the girl Subbamma. We must remember that in coming to this decision, the testator's words that the gift was being made to

1. (1927) 28 L.W. 869.

Ramamma v. Venkatalakshmamma. — Abdur Rahman, J.

his *sister's son* Subbayya could not have been possibly ignored. There was no suggestioh in the clause actually containing the bequest that Subbayya would marry his daughter Subbamma. There was apparently nothing in that will similar to what we find in this will as to the reason why the bequest was being made by the testator to his daughter and to his son-in-law. Our attention was however invited to certain observations by Mr. Justice Ramesam in that judgment, where the learned Judge came to the decision that the word "illatom son-in-law" in that will was meant to convey "intended son-in-law". We do not understand Mr. Justice Ramesam to have said that in every case an illatom son-in-law should be taken to cover an intended son-in-law. We can only take it to mean that in construing that will this was his opinion. There was a direction in that will that the testator's sister's son Subbayya should be kept as illatom son-in-law and that his daughter Subbamma should be given in marriage to him. In referring to those words the learned Judge observed:

"By saying that he should be kept as illatom son-in-law what he apparently meant was that he should be kept in the house with a view to marrying his daughter when the proper time arrived."

Then follows the sentence:

" Illatom son-in-law means intended son-in-law."

It follows that the learned Judges in that case were of opinion that the bequest was not being made to Subbayya on the condition of his marrying the testator's daughter Subbamma but irrespective of that consideration. If that be so, the decision can be well understood; but has no relation to the facts of the present case. Learned counsel for respondent placed reliance on *Schloss* v. *Stiebel*,[1] as well. This was done, as a bequest of £ 3,000 was made to Adelaide Schloss who was described as the testator's wife in one part of the will while in the beginning of the will the testator had refeted to her as "Miss Adelaide Schloss, my niece which I may marry in a few days." It was held in that case that the legacy was not given to Miss Adelaide Schloss on the condition of the testator marrying her although the will was made under the impression that the intended marriage would take effect and the testator had described the plaintiff with reference to his intention of marrying her.

1. (1833) 58 E.R. 495.

Ramamma v. Venkata-lakshmamma.

Abdur Rahman, J.

This case is distinguishable from the present one as we have found on the construction of the will that Sankariah's marriage with Ramamma was regarded by the testator to be a condition precedent before the bequest could take effect.

In view of this construction of the will it is unnecessary to refer to the cases that were cited by the learned counsel for the respondent in any detail. *Fanindra Deb Raiket* v. *Rajeswar Das*[1], *Karamsi Madhowji* v. *Karsandas Natha*,[2] and on appeal to the Privy Council in *Karamsi Madhowji* v. *Karsandas Nathu*,[3] *Lali* v. *Murlidhar*[4].

A consideration of all these cases leads us to the conclusion that in construing a bequest made by a testator we have to ascertain his intention. If the testator intended to have conveyed a benefit on a particular individual as a *persona designata*, the bequest would take effect although the description of the person may be, or may turn out to be, wrong. If, on the other hand, the testator's intention is found to be that the bequest is conditional on an adoption or on some other relationship on account of which he is making the gift, the gift as such must fail if the adoption or relationship is not found to exist or does not come into existence.

Having regard to this test and bearing the words of Veerappa's will in mind, we have no hesitation in holding that he did not intend to confer any benefit on Sankariah if Sankariah did not marry his daughter. In fact, our own conclusion is, as we have stated elsewhere in this judgment, that Veerappa did not anticipate that contingency at all at the time when he was writing his will. On this point, therefore, we must disagree with the decision of the lower Court.

Some attempt was made in the beginning of his arguments by learned counsel for the appellant to show that Veerappa had left no will and that in any case the copy of the will produced in the lower Court was not a true copy of that will and was not admissible in evidence without the proof of the loss of the original. But after hearing him we were of opinion that there was no force in this contention. Since, however, he is succeeding in regard to the construction of the will, it is un-

1. I.L.R. (1885) 11 Cal. 463: L.R. 12 I.A. 72 (P.C.).
2. I.L.R. (1896) 20 Bom. 718.
3. I.L.R. (1898) 23 Bom. 271.
4. I.L.R. (1906) 28 All. 488: L.R. 33 I.A. 97 (P.C.).

necessary for us to give our reasons for that finding in any detail. Suffice it to say that, in our opinion, those contentions had no force.

The result of our finding is that this appeal must be accepted and the plaintiff's suit dismissed. But since it was attempted to be defended both in the lower Court and in this Court on incorrect grounds, we would leave the parties to bear their own costs throughout.

K. S. —— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

K. V. Ramaswami Ayyar .. *Petitioner (Petitioner-Defendant)*

v.

Ramayya Sastrigal .. *Respondent (Respondent-Plaintiff)*

Madras Agriculturists' Relief Act (IV of 1938), S. 19—Payment before 1st October, 1937 towards a decree for principal, interest and costs and entering of part satisfaction—Re-appropriation—If permissible.

On a promissory note dated 27th June, 1933 for Rs. 3,000 a decree was passed for Rs. 3,400, principal and interest with Rs. 337 as costs. On 23rd February, 1937 the respondent purchased the judgment-debtor's property in execution for Rs. 3,406 for which amount part satisfaction was entered on 17th July, 1937. On 30th August, 1937 a fresh E. P. was filed claiming Rs. 662-7-6 as the balance due under the decree. On an application for scaling down,

Held, the payment of Rs. 3,406 cannot be regarded as a payment to the debt generally, kept in suspense and not appropriated. The payment being more than sufficient to cover all the interest on the debt, the debtor will not be benefited by any re-appropriation from principal to costs under the proviso to S. 19.

Petition under S. 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the Court of the Subordinate Judge of Tiruvarur dated 2nd September, 1938 and made in I.A. No. 174 of 1938 in O.S. No. 28 of 1935.

T. V. Ramiah for Petitioner.

T. L. Venkatarama Iyer for Respondent.

The Court delivered the following

JUDGMENT:—This is a petition raising a question under S. 19 of Act IV of 1938. The decree arose out of a promis-

* C.R.P. No. 1213 of 1938. 16th September, 1940.

Ramaswami Aiyar v. Ramayya Sastrigal.

sory note dated 27th June, 1933 for Rs. 3,000 (Three thousand). When the decree was passed, the amount due for principal and interest was Rs. 3,400 with Rs. 377 (Three hundred and thirty seven) as costs. On 23rd February, 1937 this respondent in execution purchased property of the petitioner (the judgment-debtor) for Rs. 3,406 (Three thousand four hundred and six) for which amount part satisfaction was entered on 17th July, 1937. On 30th August, 1937 a fresh execution petition was filed, claiming Rs. 662—7—6 (Six-hundred and sixty two annas seven and pies six only) as the balance due under the decree. The question is what is the effect of this payment of Rs. 3,406 (Three thousand four hundred and six) towards the decree having regard to the provisions of Ss. 8, 9 and 19 of the Act.

It seems to us that this payment cannot be regarded as a payment to the debt generally kept in suspense and not appropriated. It was actually applied in satisfaction of the decree and a *protanto* discharge was given. Even if the presumption that it was appropriated first towards interest is not to be drawn when both principal and interest have become merged in a single decree debt there is certainly no presumption that it was appropriated first towards principal. That being so, the payment being more than sufficient to cover all the interest on the debt, the petitioner is not in a position to show that there was on 1st October, 1937 any interest outstanding. He will not be benefited by any reappropriation from principal to costs under the proviso to S. 19. The petition is therefore dismissed with costs.

K. S. *Petition dismised.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

Saraswathi Ammal .. *Petitioner** (*Defendant*)

v.

Arabusa Sahib ... *Respondent* (*Plaintiff*).

Saraswathi Ammal v. Arabusa Sahib.

Madras Agriculturists' Relief Act (IV of 1938), Ss. 8 (1), 19 and 20—Dismissal of stay application under S. 20 for default—Effect on right to apply for scaling down decree under S. 19—Amounts realised in execution after 1st October, 1937—Appropriation by creditor—Permissibility.

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* C. R. P. No. 1704 of 1940. 11th December, 1940.

Saraswathi Ammal v. Arabussa Sahib.

S. 20 of Act IV of 1938 does not contemplate any final decision on the question of the right of the applicant to apply under S. 19. Moreover, when the applicant allows his application under S. 20 to be dismissed for default he is clearly abandoning only his right to a stay. That abandonment may be due to many causes. For-instance, the execution may have stopped for some reasons quite apart from the proceedings under the Act. In such a case there is no point in the applicant going on with his proceedings under S. 20 if time is available to him without such proceedings for preferring his application to the Court which passed the decree under S. 19. Accordingly when an agriculturist allows his application under S. 20 to be dismissed because it is not necessary, such a dismissal would not bar the substantive application under S. 19. The period of limitation prescribed under S 20 begins to run with the grant of a stay and not when there was no grant of stay.

Kumaraswami v. *Thiruvengadatha*, (1939) 2 M.L.J. 308: I.L.R. 1939 Mad. 886, referred to and explained.

Held also, that an amount realised in execution of a decree after 1st October, 1937, could not be appropriated by the decree-holder to interest accruing due before 1st October, 1937, so as to nullify the effect of S. 8 (1) of the Act.

Suryanarayanamurthy v. *Viramma*, (1940) 2 M.L.J. 547, followed.

Petition under S. 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the District Court of Coimbatore dated 11th March, 1940 and made in Civil Appeal No. 382 of 1939 preferred against the order of the Court of the District Munsif of Gobichettipalayam dated 27th March, 1939 and made in I.A. No. 991 of 1938 in O. S. No. 61 of 1933.

N. Sivaramakrishna Aiyar for Petitioner.

R. Ramamurthi Aiyar for Respondent.

The Court delivered the following

JUDGMENT.—This petition raises questions under Madras Act IV of 1938 and arises out of an application under S. 19 of that Act.

The lower Court held that an amount realised in execution of the decree after 1st October, 1937, could not be appropriated by the decree-holder to interest accruing due before 1st October, 1937, so as to nullify the effect of the application of S. 8 (1) of the Act. The appellate Court took the view that when the decree-holder had appropriated to interest money received after 1st October, 1937, to re-adjust that money to principal after wiping off interest which accrued due on 1st October, 1937, would amount to the ordering of a refund which would be opposed to the provisions of sub-S. (4) of S. 8. That decision is clearly erroneous in the light of the

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Bench decision in *Suryanarayanamurthy* v. *Viranna*,[1] and the decision of the District Munsif is correct on this point.

The respondent however seeks to support the order of the learned Additional District Judge on another ground. The proceedings under Act IV started with an application under S. 20 filed on 22nd August, 1938, at a time when the sale in execution was pending. This application was posted for hearing to 5th September, 1938 and the sale was adjourned to the same date. On 5th September, 1938, the application under S. 20 was dismissed for default. The application under S. 19 was not filed until 29th October, 1938. It is contended that the applicant cannot be in a better position when his application under S. 20 has been dismissed than he would have been if a stay had been ordered in the first instance and also that the dismissal of his application under S. 20 bars an application under S. 19. It seems to me that there is no substance in either of these contentions. It was decided by a Bench in *Kumaraswami* v. *Thiruvengadatha*,[2] that the period prescribed under S. 20 is a period of limitation arising in the circumstances contemplated in that section, that is to say, on the grant of a stay; and the learned Chief Justice observed:

> "So long as a debt is enforceable a debtor has a right to apply at any time for the scaling down of the debt, except in the circumstances contemplated by S. 20."

Quite clearly, the period of limitation prescribed in S. 20 begins to run with the grant of a stay. There was no grant of stay in this case.

It cannot be held that the dismissal of the application under S. 20 for default amounts to a binding adjudication that the applicant is not entitled to the benefits of the Act. An application under S. 20 is heard by the executing Court; whereas an application under S. 19 is heard by the Court, which passed the decree. The executing Court has to be satisfied *prima facie* that the applicant is a person who would be entitled to present an application under S. 19. But S. 20 does not contemplate any final decision on the question of the right of the applicant to apply under S. 19. Moreover, when the applicant allows his application under S. 20 to be

1. (1940) 2 M.L.J. 547.
2. (1939) 2 M.L.J. 308: I.L.R. (1939) Mad. [illegible]

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dismissed for default, he is clearly abandoning only his right to a stay. That abandonment may be due to many causes. For instance, the execution may have stopped for some reasons quite apart from the proceedings under Act IV. In such a case, there is no point in the applicant going on with his proceedings under S. 20 if time is available to him without such proceedings for preparing his application to the Court which passed the decree, under S. 19. It would be impossible to hold that, when an agriculturist allows his application under S. 20 to be dismissed because it is not necessary, such a dismissal would bar the substantive application under S. 19.

In the result therefore I allow the revision petition with costs throughout and restore the order of the District Munsif.

K. S. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATARAMANA RAO AND MR. JUSTICE HORWILL.

Kanakasabapathi Chetty .. *Appellant (Plaintiff)*

v.

Unnamalai Ammal and another .. *Respondents (Defendants).*

Kanakasabapathi Chetti v. Unnamalai Ammal.

Practice—Costs—Beneficiary propounding will and applying for probate—Contest by widow—Putting plaintiff to proof—Costs of beneficiary proving the will—Right to—Practice—Duty of Probate Court to grant letters of administration with the will annexed to proper person, where no executor is appointed under will.

Where a beneficiary applied for probate of a will and on the application being contested he was put to proof of the will,

Held, that the usual practice in cases where a plaintiff seeks to establish a will under which he has been given a legacy and he is merely put to proof of it, is to award costs to both parties from and out of the estate.

In cases where no executor has been appointed under the will it is the duty of the Probate Court on the will being established to direct the issue of letters of administration with will annexed to such persons as are under the Succession Act competent to administer the estate thus avoiding further expense and litigation.

Appeal against the decree of the District Court of North Arcot at Vellore dated the 8th March, 1938 and made in O. S. No. 1 of 1937 (O. P. No. 6 of 1937 on the file of the said District Court).

T. K. Sundararaman for Appellant.

A. A. O. No. 217 of 1938. 7th January, 1941.

Kanakasabapathi Chetti v. Unnamalai Ammal.

Venkataramana Rao, J.

Ch. Raghava Rao for Respondents.

The Judgment of the Court was delivered by

Venkataramana Rao, J.—This appeal arises out of an application for probate of a will left by one Varadappa Chetti. The application was contested by his widow Unnamalai Ammal and it was therefore registered as a suit under the Indian Succession Act. The plaintiff in the suit and his brother Subramania Chetti since deceased were the sons of the brother of the first wife of the said Varadappa Chetti and they were being brought up by Varadappa Chetti as their parents were dead. The will propounded is dated the 4th April, 1930 and under it there were bequests in favour of the plaintiff and his brother and also in favour of Unnamalai Ammal. Unnamalai has put the plaintiff to proof of the will and the validity of the dispositions and also contended that the plaintiff was not entitled to probate on the ground that he was not appointed executor expressly under the will nor an executor by necessary implication and that in any event as Subramania Chetti died before the testator she was entitled to all his interest under the will as on intestacy. The learned District Judge framed several issues including the issue whether the will relied on was true and validly executed. He found that the will was genuine and validly executed by the testator. Then he went into the respective rights of the parties under the will and declared that Unnamalai was entitled to a life estate under the will and that it was only after her life that the plaintiff and his brother Subramania Chetty were to enjoy the property devised under the will. He also held that in regard to the interest of Subramania Chetti there was an intestacy and with regard to this it seems to us that inasmuch as Subramania Chetti died before the will the testator must be deemed to have died intestate. But the question is not whether or not there was an intestacy with regard to the interest of Subramania Chetty but the question is, the will having been proved who is entitled to either probate or letters of administration with the will annexed for the administration of the estate left by the testator. We are satisfied that on the construction of the will the plaintiff would neither be a residuary legatee nor an executor by necessary implication. The only question therefore is, who is entitled to grant of letters of administration with the will annexed. Under Ss. 234 and 235 of the Succession Act the

Kanakasabapathi Chetti *v.* Unnamalai Ammal — Venkataramana Rao, J.

person who would *prima facie* be entitled to letters of administration would be the widow Unnamalai. It seems to us that the learned Judge was not warranted in dismissing the suit with costs of the first defendant for the simple reason that the plaintiff had come to Court for establishing the will. The will having been established it is the duty of the Probate Court to direct letters of administration with will annexed, in cases where no executor had been appointed, to such persons as are under the Act competent to administer the estate, thus avoiding further expense and litigation. We therefore think that letters of administration with will annexed ought to be issued to the widow.

In regard to the question of security Mr. Raghava Rao represents to us that Unnamalai was appointed receiver in the lower Court and that she has given security and that the mundi business which was one of the items bequeathed under the will was wound up and the sale proceeds have been realised and deposited into Court. It is open to the lower Court to take this matter into consideration and fix such security as is necessary in the circumstances of the case before directing letters of administration to issue.

In regard to the other questions gone into by the learned District Judge which relate to the respective rights of parties under the will, we think it is unnecessary to go into them and we therefore set aside the findings of the learned Judge on those issues and leave the questions raised by them open.

As the plaintiff had to come to Court to establish the will the learned Judge was not warranted in depriving him of his costs. The usual practice in cases where a plaintiff seeks to establish a will under which he has been given a legacy and where the will has not been attacked but the plaintiff is merely put to proof of it, is to award costs to both parties from and out of the estate.

In the result, we set aside the order of the lower Court and direct the issue of letters of administration with will annexed to Unnamalai on taking security as aforesaid. The costs of both parties here and in the lower Court will come out of the estate.

K. S. *Appeal allowed.*

Sabapathi Mudaliar v. Rajarathna Mudaliar.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

A. Sabapathi Mudaliar .. *Petitioner** (*Petitioner-1st Defendant*)

v.

Rajarathna Mudaliar and others *Respondents* (*Respondents-Plaintiffs Nos. 1 & 2 Defendants 2 to 4*)

Madras Agriculturists' Relief Act (*IV of* 1938), *S.* 8 *Explanation—Scope—Son estopped from questioning liability under a mortgage after partition by his father which he had attested—Subsequent mortgage by the son of his own property in discharge of father's mortgage debt—If renewal of earlier debt.*

Although it had been held that a son was estopped from disputing the liability of his property under a mortgage by his father after partition by reason of his attestation of the mortgage, it cannot be said that a fresh mortgage executed by the son alone binding only his own property and discharging his father's mortgage is merely a renewal of the son's own liability. There is a complete *novatio* which cannot be treated as a renewal by the same debtor.

Petition under S. 115 of Act V of 1908 praying that the High Court will be pleased to revise the order of the District Court of East Tanjore dated the 12th September, 1938 and passed in O. P. No. 25 of 1938 in O. S. No. 18 of 1936.

A. V. Viswanatha Sastri for Petitioner.

S. Muthiah Mudaliar for Respondent.

The judgment of the Court was delivered by

Wadsworth, J.

Wadsworth, J.—This Civil Miscellaneous Appeal is preferred against a decision under S. 19 of Madras Act IV of 1938. We have been asked to treat the appeal as a civil revision petition and it has been heard on that footing. The appellant will pay the deficient court-fee.

The petitioner (appellant) sought to scale down the decree on a mortgage (Ex. A) dated the 27th June, 1933. This mortgage was the result of a long series of prior transactions. Firstly, there were three successive promissory notes executed by the petitioner's father Arunachalam, who is still living, in favour of the father of respondents 1 and 2. Then in 1919 the debt was split into two promissory notes (Exs. C and C-1) executed by the same Arunachalam, one in favour of the first

* C. R. P. No. 1909 of 1940 (A. A. O. No. 661 of 1938 converted into a C.R.P.) 16th October, 1940.

respondent and the other in favour of the second respondent, the respondents' family being undivided. In July, 1920 there was a partition in the debtor's family between the petitioner and his father Arunachalam. And in 1921 the father Arunachalam executed a mortgage (Ex. E) in discharge of both the promissory notes (Exs. C and C-1) the mortgagees being the two promisees (the 1st and 2nd respondents). This mortgage covered 64·79 acres, apparently including the property which had fallen to the share of the son (petitioner) in the partition. It is said that, owing to the fact that the document of partition was unregistered, the son attested the mortgage executed by the father. Then in 1933 we have the suit mortgage deed (Ex. A) executed by the son alone in favour of the same mortgagees and binding only 28·79 acres said to be the share of the son. This mortgage discharges Ex. E and the father Arunachalam is thus exonerated from liability. In the suit on Ex. A it was held that the present petitioner was estopped from denying his liability under the previous mortgage (Ex. E) and consequently that Ex. A was binding on the petitioner's sons as having been in discharge of an antecedent debt. It is now contended that because the petitioner has been held to have been under a liability in respect of Ex. E, his own mortgage (Ex. A) which discharged Ex. E must be treated as a renewal for the purpose of the Explanation to S. 8 of Madras Act IV of 1938. It seems to us that this is carrying the theory of renewal of liability too far.

It would appear that the son's property was bound by the mortgage Ex. E, but it was not bound as the peoperty of the son. The son permitted his property to be mortgaged by his father and it was, at any rate in form, a mortgage by the father of the father's property. Although it was held that the son was estopped from disputing the liability of his property under this mortgage by reason of his attestation of the mortgage, it seems to us to be going too far to say that the fresh mortgage executed by the son alone binding only his own property and discharging his father's mortgage is merely a renewal of the son's own liability. In form Ex. A is an entirely new contract superseding the previous mortgage by a different person. The father and son were divided and it is only by reason of an estoppel that the son is in any way connected with the previous transaction. We have held that in order to constitute either a

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Wadsworth, J.

renewal or an inclusion within a fresh document for the purpose of the Explanation to S. 8 the debtor must be substantially the same. We do not consider that this criterion is satisfied in the present case and we are of opinion that there is a complete *novatio* which cannot be treated either as a renewal or an inclusion in a fresh document by the same debtor. It follows that the decision of the lower court is correct.

The further question whether the earlier promissory notes can be said to be in favour of the same creditor becomes purely academic. But we may say that in our opinion the matter is covered by our previous decision reported in *Varadarajam Pillai* v. *Krishnamurthi Pillai*[1].

In the result therefore the appeal treated as a civil revision petition is dismissed with costs.

K S. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KING AND MR. JUSTICE PATANJALI SASTRI.

Gadamsetti Peddi Subbarayadu and another	*Appellants** (*Defendants Nos. 2 & 3*)
v.	
Lingam Yella Somayya, minor by next friend Kotrike Ramakrishnayya and others.	*Respondents* (*Plaintiff and Defendants Nos. 1 & 4.*)

Subbarayadu v. Somayya.

Madras Agriculturists' Relief Act (IV of 1938), S. 21—Insolvency of mortgagor and declaration of dividend in the insolvency - Purchasers of equity of redemption—Right to have mortgage decree scaled down.

Where a mortgagor has been adjudged insolvent and a dividend has been declared in the insolvency, the purchasers of the equity of redemption who are agriculturists are entitled to have the mortgage decree scaled down under Act IV of 1938.

Decision of Wadsworth, J. in *Sooryanarayana* v. *Ramamma*, (1940) 2 M.L.J. 291, approved.

Appeal against the decree of the Court of the Subordinate Judge of Kurnool dated 11th October, 1938 and passed in O.S. No. 41 of 1938 (O. S. No. 50 of 1937, District Court of Kurnool).

K. S. Jayaram for Appellants.

V. Govindarajachari for Respondents.

1. (1940) 2 M.L.J. 664.

* Appeal No. 7 of 1939. 29th November, 1940.

Subbarayadu v. Somayya. King, J.

The judgment of the Court was delivered by

King, J.—This appeal must succeed on all points. It is not disputed that appellants are agriculturists and debtors within the meaning of the Madras Act IV of 1938 see *Periaswami Chettiar* v. *Ramswami Goundan*.[1] It is argued however for the 1st respondent that inasmuch as plaintiff's mortgage debt which the appellants are liable to pay as puisne mortgagees is also payable by first defendant as the mortgagor and first defendant has become insolvent, by S. 21 of the Act, the debt cannot be scaled down. We are unable to accept this argument. We think that good reasons are given in the judgment of Wadsworth, J., *Suryanarayana* v. *Ramamma*[2], for holding that though this is a debt payable by two persons, the section does not apply when the claim of the debtor who is not an insolvent is being considered. The appeal will therefore be allowed and plaintiff's decree scaled down in accordance with the provisions of the Act. The parties will give and take proportionate costs in the Court below and the first respondent must pay appellants, costs of this appeal. Time for redemption, three months.

K. S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KRISHNASWAMI AYYANGAR.

Raju Chettiar alias Ramasami Chettiar and others ... *Appellants (Defendants 3, 4, 5, 6 and 7)*

v.

Ramakkal and another ... *Respondents (Plaintiff and 1st Defendant)*

Raju Chettiar v. Ramakkal.

Civil Procedure Code (V of 1908), O. 17, r. 1 and O. 33, r 8—Suit in forma pauperis—*Trial-plaintiff not ready—Grant of adjournment conditional on paying day costs within next hearing—Costs not paid—Power of Court to dismiss suit—Pauper, if exempted from payment of adjournment costs.*

In a suit filed in *forma pauperis*, the plaintiff was not ready at the date of the hearing and on his application the Court adjourned the case directing as a condition precedent that the plaintiff should pay day costs to the defendants within the next hearing date. By the adjourned date, the plaintiff had not paid the costs. On a contention as to the propriety of attaching such a condition and the procedure to be adopted on breach thereof,

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1. (1940) 2 M.L.J. 513.

2. (1940) 2 M.L.J. 291.

A. A. O. No. 45 of 1939. 3rd December, 1940,

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Held, the Court has jurisdiction under O. 17, r, 1 Civil Procedure Code, to pass an order of adjournment conditional on payment of costs by the plaintiff on failure of which the suit should straightaway be dismissed. *Veerabhadrappa Chetti* v. *Chinnamma*, (1897) 8 M.L.J. 189=I.L.R. 21 Mad. 403 and *Dadamudy Tatayya* v. *Kelachina Venkatasubbaraya Sastri*. 1928 Mad. 786 followed.

Held further, that under O. 33, r. 8, a pauper plaintiff is not exempted from the payment of costs of adjournment; the Court has therefore power to direct him to pay the costs of an adjournment granted at his instance.

Lim Pin Sin v. *Eng Van Hock*, (1928) 6 Rang. 561 followed.

Ambaji v. *Hanmantrao*, I.L R. (1922) 47 Bom. 104 not followed.

Appeal against the order of the Court of the Subordinate Judge of Dindigul dated the 22nd November, 1938 and passed in A. S. No. 84 of 1938 preferred against the order of the Court of the District Munsif of Periyakulam dated the 17th February, 1938 and passed in O. S. No. 200 of 1937.

K. Rajah Iyer and *V. Seshadri* for Appellants.

R. Desikan for *G. K. Damodara Rao* for Respondents.

The Court delivered the following

Judgment:—This is an appeal against the order of the Subordinate Judge of Dindigul setting aside the decree passed by the District Munsif of Periyakulam dismissing the suit of the appellant on the ground that she had failed and neglected to perform a condition precedent on the performance of which she was granted an adjournment of the suit.

The facts are these. The first respondent filed the suit out of which the present appeal has arisen for a declaration that the decree and subsequent proceedings in O. S. No. 156 of 1930 on the file of the District Munsif's Court, Periyakulam, are void and not binding on her and for recovery of possession of certain immovable properties together with mesne profits. She obtained leave to file the suit in *forma pauperis*. The defendants contested the suit and issues were framed on the 20th August, 1937 embodying the questions in dispute. The trial was fixed for the 12th October, 1937. On that day the plaintiff was not ready and the suit was adjourned to the 24th November, 1937. The plaintiff was again unready and the suit had again to be adjourned to the 21st January, 1938. On the 21st January, 1938 the plaintiff was once again not ready and the Court was obliged to adjourn the suit to the 8th February, 1938. On that day it appeared that the plaintiff was again not ready and she prayed for a further adjournment of the suit.

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The adjournment was granted but the plaintiff was directed as a condition precedent to pay two sets of day costs of Rs. 5 each, the idea being that the day costs should be paid to the contesting defendants on or before the adjourned date. Subject to the said condition the suit was adjourned to the 17th February, 1938. Neither on that day nor on any day previous did the plaintiff pay the costs ordered and the District Munsif therefore dismissed the suit. An appeal was preferred to the Subordinate Judge of Dindigul who reversed the decree of the District Munsif on the ground that as the appellant was a pauper she should not have been asked to pay the day costs and that her suit ought not to have been dismissed for non-payment of the same. For this view the learned Judge relied upon the decision of the Bombay High Court reported in *Ambaji* v. *Hanmantrao*[1].

The only relevant provision of the Code of Civil Procedure on the point is that contained in O. 33, r. 8 which says:

"Where the application (application for leave to sue as a pauper) is granted, it shall be numbered and registered, and shall be deemed the plaint in the suit, and the suit shall proceed in all other respects as a suit instituted in the ordinary manner, except that the plaintiff shall not be liable to pay any court fee (other than fee payable for service of process) in respect of any petition, appointment of a pleader or other proceeding connected with the suit."

The meaning of the rule is clear that when permission is given to a party to sue as a pauper he gets immunity from payment of the court fee on the plaint and also on any petition, appointment of a pleader, or other proceeding connected with the suit. The pauper plaintiff is not excused from payment of the fees payable for service of process nor is there anything in the language of the rule to warrant the idea that the pauper plaintiff is exempted from liability for the day costs, if and when the court directs that the same should be paid. The decision of the Bombay High Court in the case cited appears to lay down the proposition that once a person is found to be a pauper and allowed to sue as such the Court has no right to direct the pauper to pay the costs in cash. The Court considered that such an order was 'wholly improper'. With very great respect I am unable to follow this decision. The learned Judges have not taken into consideration the effect of the language employed in O. 33, r. 8 Civil Procedure Code in

1. (1922) I.L.R. 47 Bom. 104.

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coming to their conclusion. If the language of the rule is considered it will be seen that an order permitting a party to sue as a pauper does not operate to confer a general immunity from liability to pay costs or other fees except those specifically mentioned. The same question arose in *Lim Pin Sin* v. *Eng Van Hock*,[1] where it appeared that an adjournment was granted to the plaintiff on condition that he paid the costs. In default the suit was to stand dismissed. The plaintiff not having paid the costs as directed by the order of the Court the suit was dismissed. It was argued on the authority of *Ambaji* v. *Hanmantrao*,[2] that the direction that a pauper plaintiff should pay the costs as a condition of the adjournment was wrong and should be ignored. The learned judges expressed the opinion that the facts in the Bombay case were not parallel to those before them and that they were unable to hold that an order making the payment of costs a condition of the adjournment was unjustified. I am of the opinion that the order of the Court which directed the first respondent to pay the costs specified in the order as a condition precedent for the further hearing of the suit is not illegal.

But it was urged that even assuming that the Court had the power to make the order in question it was not right for the Court to dismiss the suit but that the Court should have merely gone on to try it. O. 17, r. 1 Civil Procedure Code says:

"(1) The Court may, if sufficient cause is shown, at any stage of the suit grant time to the parties or to any of them, and may from time to time adjourn the hearing of the suit.

(2) In every such case the Court shall fix a day for the further hearing of the suit, and may make such order as it thinks fit with respect to the costs occasioned by the adjournment."

It is clear from r. (2) that the Court is given ample discretion as regards the conditions subject to which it may adjourn the hearing of the suit in so far as the costs occasioned by the adjournment are concerned. I am not prepared to say that when the Court finds a plaintiff constantly defaulting in being ready for the trial it will not be justified in directing the payment of the day costs as a condition precedent to the further hearing of the suit. When such a condition is inserted in the order it is valid and could be enforced by the dismissal of the suit. The question whether in such circumstances the Court can dismiss a suit arose for consideration in *Veerabhadrappa*

1. (1928) I.L.R. 6 Rang. 561. 2. (1922) I.L.R. 47 Bom. 104.

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Chetti v. *Chinnammal*[1]. In that case it appeared that an application for the grant of a succession certificate to a widow was opposed by a brother of the deceased. On the day of the hearing the applicant was ready to proceed but the brother applied for an adjournment and it was granted, the Court directing him to pay the costs of the adjournment. On the adjourned date the order for payment of costs not having been complied with the Court proceeded under S. 158 Civil Procedure Code (corresponding to O. 17, r. 3 of the present Code) and issued a certificate in favour of the applicant. An appeal was preferred to the High Court and the question was as to whether the order of the lower Court not made on the merits could be sustained on the sole ground that there was a default in the payment of costs by the appellant. The learned Judges observed:

"Such costs would ordinarily be recoverable in execution, and, in the absence of a specific order making their payment a condition precedent to hearing the counter-petitioner's evidence, the counter-petitioner's failure to pay would not render S. 158 applicable."

It is clear from this case that there is nothing illegal in the payment of costs being made a condition precedent and in a case where that is done there is nothing wrong in the Court giving effect to it by the dismissal of the suit itself. To the same effect is another decision of this Court in *Dadamudy Tatayya* v. *Kelachina Venkatasubbaraya Sastry*[2]. In that case the defendant who had not been ready on more than one occasion applied for an adjournment to enable him to cross-examine the plaintiff's witnesses. The application was granted subject to the costs of the other side being paid before the date of the next hearing. The costs were not paid and the Court refused to allow the defendant to cross-examine the plaintiff's witnesses. An appeal against the order of the trial Court was preferred to this Court. Devadoss, J., observed as follows:

"When the Court grants an adjournment and directs the party applying for the adjournment to pay the costs of the other side before the date of the next hearing, it is well understood that unless the party ordered to pay the costs does pay before the date of the next hearing he would have no right to be heard."

These authorities warrant me in coming to the conclusion that it is competent to a Court when it finds that a condition precedent to the hearing of the suit had not been fulfilled, to

1. (1897) 8 M.L.J. 189: I.L.R. 21 Mad. 403.
2. I.L.R. (1928) Mad. 786.

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dismiss the suit and this is precisely what has happened in the present case. The view of the learned Subordinate Judge based upon the decision in *Ambaji* v. *Hanmantrao*,[1] cannot therefore be sustained.

The result is that this appeal is allowed and the decree of the District Munsif restored. The respondents will pay the appellant's costs in the appeal here.

Leave refused.

K. S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE HAPPELL.

V. Panchapakesa Aiyar .. *Appellant** (*Plaintiff*)

v.

The Secretary of State for India in Council represented by the Collector of Tanjore. *Respondent* (*Defendant*)

Panchapakesa Aiyar v. Secretary of State for India in Council.

Madras Electoral Rules, r. 48—Claim for return of deposit by unsuccessful candidate for election to a seat in the Legislative Council—Forfeiture of deposit and rejection of claim by Returning Officer affirmed by Local Government—Suit in Civil Court for recovery of amount—Maintainability.

An unsuccessful candidate for election to a seat in the Legislative Council held on 10th March, 1930, applied for the refund of his deposit to the Returning Officer who passed an order declaring that the deposit was forfeited to the Government. The petition to the Local Government against the order was rejected and the candidate filed a suit in the Civil Court for the recovery of the amount deposited by him. On the question of the jurisdiction of the Civil Court to entertain the suit,

Held, that the decision of the Government must for the purposes of the case be taken to be the decision of the Governor under r. 48 of the Electoral Rules which says that the question shall be referred for the decision of the Governor whose decision shall be final. The Governor, the only competent tribunal, having decided the case against the candidate a suit does not lie in the Civil Court to recover the deposit. The Civil Court would have jurisdiction only if the proper tribunal had declined jurisdiction and the aggrieved party was bereft of his statutory and constitutional remedy.

Decision of Wadsworth, J., in (1938) 2 M.L.J. 745, affirmed.

Sarvothama Rao v. *Chairman, Muncipal Council Saidapet*, (1923) I.L.R. 47 Mad. 585: 45 M.L.J. 23 and *Thimma Reddi* v. *Secretary of State*, (1923) I.L.R. 47 Mad. 325: 46 M.L.J. 60, relied on.

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1. (1922) I.L.R. 47 Bom. 104.

* L. P. A. No. 93 of 1938. 28th November, 1940.

Appeal under Cl. 15 of the Letters Patent against the Order of the Hon'ble Mr. Justice Wadsworth dated 6th June, 1938 and made in S. A. No. 510 of 1934[1] preferred against the decree of the Court of the Subordinate Judge of Tanjore in A. S. No. 73 of 1933 (O.S. No. 245 of 1930, District Munsif's Court, Tanjore).

Panchapakesa Aiyar *v.* Secretary of State for India in Council.

M. S. Venkatarama Aiyar for Appellant.

The Government Pleader (*B. Sitarama Rao*) for Respondent.

The judgment of the Court was delivered by

Leach, C.J.

The Chief Justice.—The appellant was the unsuccessful candidate at a bye-election for the Governor's Legislative Council held on the 10th March, 1930. He secured 1618 votes against 11,299 valid votes cast for his opponent. The total number of votes was 13,373, but 456 votes were found to be invalid. Under r. 12 (1) of the Madras Electoral Rules, framed under Ss. 72-A and 129-A of the Government of India Act (the Act of 1915) a candidate is required to deposit with the Returning Officer the sum of Rs. 250 in cash or in Government promissory notes. Under sub-r. (3), if a candidate is not elected and the number of votes polled by him does not exceed in the case of a constituency returning one or two members one-eighth of the total number of votes polled, or in the case of a constituency returning more than two members, one-eighth of the number of votes polled divided by the number of members to be elected the deposit shall be forfeited to the Government. Sub-r. (4) says that for the purpose of sub-r. (3) the number of votes polled shall be deemed to be the number of ballot papers other than spoilt ballot papers counted. Excluding the invalid votes the appellant secured one-eighth of the votes polled, but including them he had less than one-eighth of the total. The appellant applied to the Returning Officer for the return of his deposit, claiming that the invalid votes should be treated as spoilt ballot papers and therefore should not be counted. The Returning Officer passed an order declaring that the deposit was forfeited to Government. The appellant petitioned the Local Government against the Returning Officer's Order, but his petition was rejected. R. 48 of the Electoral Rules states that if any question arises as to the interpretation of the rules, otherwise than in connection with

1. (1938) 2 M.L.J. 745.

Panchapakesa Aiyar v. Secretary of State for India in Council.

Leach, C. J.

an election inquiry held thereunder, the question shall be referred for the decision of the Governor and his decision shall be final. The decision of the Government must for the purpose of this case be taken to be the decision of the Governor under this rule.

As the appellant's petition was rejected, he filed the suit out of which this appeal arises in the Court of the District Munsif of Tanjore against the Secretary of State for India in Council for the recovery of the Rs. 250 deposited by him. The District Munsif decreed the suit, but his decision was reversed on appeal by the Subordinate Judge of Tanjore, who held that the suit did not lie. The appellant then appealed to this Court and his appeal was heard by Wadsworth, J., who agreed with the Subordinate Judge, but gave a certificate under Cl. 15 of the Letters Patent which has permitted the present appeal to be filed.

Wadsworth, J., was of the opinion that the suit did not lie because the electoral rules provide a special agency for the interpretation of the rules in doubtful or disputed cases and therefore the jurisdiction of the Civil Court was ousted. He also held against the appellant on the interpretation of the rules. If the appellant's deposit had been wrongly withheld from him, he certainly would have a right of suit and that has been conceded by the learned Government Pleader, who, however, says that in this case the deposit has not been wrongly withheld from the appellant. The only tribunal competent to decide whether the appellant is entitled to the return of the deposit is the Governor and his decision is against the appellant. We considered that the argument of the learned Government Pleader must prevail. It is based on two decisions of this Court which are binding upon us.

In *Sarvothama Rao* v. *Chairman, Municipal Council, Saidapet*,[1] the question arose whether a Civil Court had authority to interpret the rules framed under the Madras District Municipalities Act. S. 303 of the Act then in force provided that the Governor in Council might make rules to carry out all or any of the purposes of the Act not inconsistent therewith. In particular and without prejudice to the generality of this general power he might make rules with reference to all matters relating to elections or appointments

1. (1923) 45 M.L.J. 829: I.L.R. 47 Mad. 525.

Panchapakesa Aiyar *v.* Secretary of State for India in Council.

Leach, C.J.

of councillors not expressly provided for. R. 31 of the election rules framed in pursuance of that power stated that "if any question arises as to the interpretation of these rules otherwise than in connection with an election inquiry, the question shall be referred to the Local Government, whose decision shall be final". That rule is on all fours with r. 48 of the Madras Electoral rules. Schwabe, C.J., and Wallace, J., held that a decision by the Local Government under that rule would be final and the Civil Court would only have jurisdiction, if the proper tribunal had declined jurisdiction and the aggrieved party was bereft of his statutory and constitutional remedy. In *Thimma Reddi* v. *Secretary of State*,[1] Kumaraswami Sastri and Waller, JJ., came to a similar decision under the Madras Local Boards Act. The sections in the Government of India Act conferring powers to make rules are differently worded, but we think that S. 72-A sub-S. (4) (*c*), read with S. 129-A, gives ample power to the Governor-General in Council with the sanction of the Secretary of State in Council to frame r. 48 putting the final interpretation with the Governor. S. 72-A sub-r. (4) (*c*) gives power to frame rules with regard to the method of election and any matters incidental or ancillary thereto. There is here power to frame rules with regard to deposits and their return or forfeiture. If there is power to make such rules, there must be power to provide for their interpretation, as this Court has recognised in the two cases referred to. The Governor having the power to decide finally whether the appellant was entitled to the return of his money and having decided the case against him, the suit does not lie. For these reasons the appeal must be dismissed with costs.

K.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

Subba Reddi *v.* Venkatappa Reddi

Mettu Subba Reddi .. *Petitioner** (*Petitioner judgment-debtor*)

v.

Challa Venkatappa Reddi .. *Respondent* (*Respondent Decree-holder.*)

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1. (1923) 46 M.L.J. 60: I.L.R. 47 Mad. 325.

*C. R. P. No. 1956 of 1939. 19th December, 1940.

Subba Reddi *v.* Venkatappa Reddi

Madras Agriculturists' Relief Act (IV of 1938), S. 4 (h)—Promissory note standing in favour of men—Evidence to show that debt is really owed to a woman to invoke S. 4 (h)—Not permissible.

Where a decree was obtained by the holder of a promissory note which at least since 1935 stood in the name of men it will not be permissible for the decree-holder to adduce evidence that the debt is really owed to a woman in order to invoke S. 4 (h) of Act IV of 1938. The liability of the judgment-debtor is to the decree-holder and to no one else, though the decree-holder may himself be liable to pay the realisation to a woman.

Petition under S. 25 of Act IX of 1887 praying that the High Court will be pleased to revise the order of the Court of Subordinate Judge of Guntur dated 11th April, 1939 and made in C. M. P. No. 759 of 1938 in S. C. No. 219 of 1936.

P. Chandra Reddi and *R. Ramalinga Reddi* for Petitioner.

Kasturi Seshagiri Rao for Respondent.

The Court delivered the following

JUDGMENT.—The decree was obtained by a man on a promissory note debt which at least since 1935 has stood in the name of men. It is not permissible in such circumstances for the decree-holder to adduce evidence that the debt is really owed to a woman in order to invoke S. 4(h) of Act IV of 1938. Possibly the decree-holder may himself be liable to pay the realisations to a woman, but the liability of the judgment-debtor is to the decree-holder and to no one else. The revision petition is allowed with costs and the application is remitted to the trial Court for fresh disposal in the light of this judgment.

K. S. —— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE PATANJALI SASTRI.

The Raja of Vizianagaram (died) represented by the Manager and Estate Collector under the Court of Wards and others. *Petitioners* (Plaintiff and his L. Rs.)*

v.

Rajah of Vizianagaram *v.* Narayana Raju.

Mudunuru Narayana Raju and another. *Respondents (Defendants).*

Madras Estates Land Act (I of 1908), S. 25—Agreement by ryot to pay a premium—Ryot let into possession—Landlord, if can recover the premium afterwards.

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* C. R. P. No. 725 of 1937 2nd October, 1940.

Rajah of Vizianagaram v. Narayana Raju.

Where a ryot has agreed to pay a premium and has been let into possession before making the payment, the landholder cannot recover the amount from him afterwards. The ryot may pay the premium if he chooses but the liability cannot be enforced against him, for there is no liability after entry.

Petition under S. 25 of Act IX of 1887 praying that the High Court will be pleased to revise the decree of the Court of the District Munsif of Vizianagaram in S. C. S. No. 827 of 1936.

K. Kuttikrishna Menon for Petitioners.

Respondent not represented.

The Judgment of the Court was delivered by

Leach, C.J.

The Chief Justice:—The only question which arises on this petition is with regard to the effect of the second paragraph of S. 25 of the Madras Estates Land Act, 1908. The first paragraph of the section states that a ryot admitted by the landholder to possession of ryoti land shall not, unless otherwise provided in the Act, be bound to pay rent at a rate exceeding the rate prevailing for similar lands in the neighbourhood or, where the rate cannot be ascertained, anything more than what the Collector decides is fair and equitable. The second paragraph reads as follows:

"Nothing in this section precludes the landholder from receiving any premium when the ryot is admitted into possession, but a ryot so admitted shall under no circumstances become liable to make any payment to the landholder after his admission by way of premium or other consideration for such admission; nor shall any holding of the ryot be subjected to any charge in respect of any such premium or consideration or part thereof."

The question which the Court is called upon to answer is this: When a ryot has agreed to pay a premium and has been let into possession before making the payment, can the landholder recover the amount from him afterwards?

In the present case the Raja of Vizianagaram sued in the Court of the District Munsif of Vizianagaram to recover from the respondents a sum which was in part made up of an amount which the respondents had agreed to pay as a premium in respect of lands held by them from him. The District Munsif held that S. 25 of the Madras Estates Land Act precluded the plaintiff from recovering the premium and on this footing gave a decree only for the balance of the claim. In our opinion the District Munsif rightly construed the section.

The section expressly permits the landholder to *receive* an agreed premium at the time the ryot is admitted into possession

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of the land, but then goes on to provide that once the ryot has been admitted into possession he shall under no circumstances become liable to make any payment to the landholder of premium or other consideration for being allowed to take possession. The object of this provision is to prevent a ryot agreeing to make a payment beyond his means in order to gain possession. If he is in a position to pay a premium and he agrees to do so, the landholder is not prohibited from receiving payment before the ryot goes into possession; but he is prohibited from enforcing payment afterwards.

Mr. Kuttikrishna Menon has laid great stress on the word "become". He argues that the word "become" signifies that the prohibition is only against a ryot agreeing to pay a premium after he has entered on the holding and that there is nothing in the section which prohibits a landholder enforcing at any time payment of an amount agreed upon before the ryot goes on to the land. If the intention of the Legislature had been to allow a landholder to enforce at any time payment of a premium agreed upon before the tenancy commenced, it could very easily have said so. It has not said so and when the second paragraph of the section is read as a whole it clearly discloses a contrary intention. In our opinion the words "become liable" should be read as "be liable". The word "become" is not well chosen, but the context leaves no doubt in our minds what was meant. The ryot may pay the premium if he chooses to do so, but he cannot be held liable to pay. If the landlord permits him to go into possession without payment he does so at his own risk. There is no liability after entry.

For these reasons we consider that the District Munsif was right, and the petition must be dismissed.

K. S. —— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

Kodali Venkayamma .. *Petitioner** (*Defendant*)

v.

Mamidipaka Ramakotayya .. *Respondent* (*Plaintiff*).

Venkayamma v. Ramakotayya.

Madras Agriculturists' Relief Act (IV of 1938), S. 8 Cl. (2)—Applicability—Appropriation of open payments made prior to 1st October, 1937—Awarding of counter interest on payment made—Effect.

* C.R.P. No. 1076 of 1939. 15th October, 1940.

Venkayamma v. Ramakotayya.

When on open payments made in 1932 counter interest was awarded and a fresh promissory note was executed in 1934, after deducting the payment with counter interest,

Held, (1) that the mere fact that counter interest was awarded on open payments does not indicate that the payment should be treated as payments towards principal;

(2) that when a fresh promissory note was executed after deducting the payments with counter interest, it must be deemed that the appropriation was made at the time of the fresh promissory note;

(3) that the interest outstanding at the time of the fresh promissory note must be deemed to have been satisfied by the payment, and the balance if any appropriated towards principal; and

(4) that the onus lies heavily on the debtor to prove that the interest was outstanding on 1st October, 1937, to get the benefit of S. 8 of Madras Act IV of 1938.

Petition under S. 25 of Act IX of 1887, praying that the High Court will be pleased to revise the decree of the Court of the District Munsif of Bapatla dated 24th February, 1939 and passed in I. A. No. 1035 of 1938 in S. C. S. No. 445 of 1936.

Y. G. Krishnamurthi for Petitioner.

K. Krishnamurthi for Respondent.

The judgment of the Court was delivered by

Wadsworth, J.

Wadsworth, J.—This petition arises out of an application under S. 19 of Madras Act IV of 1938. The petitioner was the debtor. The transactions between the parties started with a promissory note for Rs. 200 in 1925. In 1928 there was a payment which cleared off all outstanding interest and a small portion of the principal and a fresh note was executed for Rs. 197-7-3. On 23rd August, 1931, there having been no further payment, a third promissory note was executed for Rs. 259-9-6. Towards this note there was a payment of Rs. 150 on 9th October, 1932, which was not expressly appropriated at that time towards principal or interest. On 17th August, 1934, the suit promissory note was executed for Rs. 162-10-0. This figure was arrived at by allowing counter interest on the payment of Rs. 150 and subtracting this payment and the interest thereon from the total amount due on the third note with interest up to the date of the renewal. The decree passed on this promissory note has been scaled down by the District Munsif in a manner which has been criticised on various grounds.

Firstly, it is contended that the act of the parties in calculating counter interest on this payment of Rs. 150 at the

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time of the last renewal must be taken to indicate that this payment was treated as a payment towards principal. The argument is that the effect of allowing counter interest is that interest on the debt ceased to the extent of this payment with effect from the date of the payment and that therefore the payment must be treated as having been appropriated towards principal. Now, in fact, there was no appropriation whatever on 9th October, 1932. The only appropriation was made on 17th August, 1934, when the debt was renewed. Is it a legitimate inference from the mere fact that counter interest was calculated on the unappropriated payment up to the date of its appropriation, that the parties considered the matter and decided to appropriate this sum towards principal and not towards interest? It must be remembered that in order to get the benefit of the first clause of S. 8 of the Act, the debtor has to show that there was on 1st October, 1937, interest outstanding which has to be cancelled. He can do this by showing that although payments have been made, they have been actually appropriated towards principal or have been kept unappropriated. But the burden lies upon the debtor to prove that interest is outstanding. We doubt very much whether the mere calculation of counter interest in circumstances such as these is any sure indication that the parties intended to go against the usual practice of crediting the payment first towards interest and secondly towards principal. This certainly is not a case of an unappropriated payment after 17th August, 1934 and certainly after this date the whole of the balance of the debt was to bear interest, so that if we have to infer appropriation towards principal, we have also to infer an undertaking by the debtor to pay interest on a large sum made up mostly of interest. The probability seems to be on the facts of this case that when the parties were negotiating for a renewal, a concession was given to the debtor in respect of this unappropriated payment whereby he was given credit for the interest which it would carry up to the time when it was appropriated. But we do not consider that this circumstance justifies the inference that the parties decided to appropriate this payment towards principal with retrospective effect to the date of payment.

The other contention is that even appropriating the payment towards interest, it should be appropriated only towards interest outstanding on 9th October, 1932. This again seems to be

misconceived, for the appropriation having been actually made on 17th August, 1934, it should be made with reference to the state of facts as on that date.

Venkayamma v. Ramakotayya. — Wadsworth, J.

Lastly, it is contended that the lower Court is wrong in applying the third clause of S. 8 without regard to the effect of the first clause. This contention must be upheld. The principal of the note as on 17th August, 1934, was Rs. 162-10-0. The decree was passed on 8th February, 1937, without any further payment having been made and in scaling down this decree the principal sum cannot be more than Rs. 162-10-0 and the interest outstanding up to 1st October, 1937, must be cancelled.

In the result therefore the petition must be allowed and the lower Court's order modified by substituting Rs. 162-10-0 for Rs. 185-8-0. In other respects the order is confirmed. Each party will bear his own costs.

K.S. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KRISHNASWAMI AIYANGAR.

Messrs. The Stock and Share Exchange Bureau, Rawalpindi, by Proprietor, Prof. N. L. Kashyap .. *Petitioner** (*Defendant*)

v.

Messrs. Kothari and Sons .. *Respondents* (*Plaintiffs*).

Stock and Share Exchange Bureau, Rawalpind v. Kothari & Sons.

Limitation Act (IX of 1908), Art. 164—Application for setting aside ex parte *decree—Starting point for limitation—'Knowledge of decree'—Means of knowledge if equivalent to knowledge—Practice—Summons—"Duly served"—Meaning—Civil Procedure Code (V of 1908), O. 9, r. 13.*

Where the summons is served on a defendant too late to afford him sufficient opportunity of appearing at the hearing of the suit, it is not a case of a summons 'duly served' within the meaning of O. 9, r. 13, Civil Procedure Code. In such cases the Court ought to issue fresh summons. An omission on the part of such a defendant to prosecute inquiry which might have led to a knowledge of the date of hearing cannot be regarded as culpable or wilful so as to carry with it the consequence of 'knowledge'. Such a defendant will be within time if he applies for setting aside the *ex parte* decree within 30 days of the actual knowledge of the decree.

Petition under S. 115 of Act V of 1908 praying that the High Court will be pleased to revise the order of the Court of Small Causes, Madras, dated the 30th June, 1938 and made in M. P. No. 1791 of 1938 in S. No. 916 of 1938.

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* C. R. P. No. 837 of 1938. 26th November, 1940.

Stock and Share Exchange Bureau, Rawalpindi *v.* Kothari & Sons.

S. Govind Swaminathan for Petitioner.

John and Row for Respondents.

The Court delivered the following

JUDGMENT.—This is a petition by the defendant in a suit on the file of the Court of Small Causes at Madras to revise an order passed by that Court refusing to set aside an *ex parte* decree passed against him on the 30th of April, 1938.

The suit was filed on the 26th of January, 1938 and the first date fixed for hearing was the 2nd of March, 1938. A summons was taken out for service on the defendant with reference to the hearing on the 2nd of March, 1938, but it was not served. The suit was adjourned to the 22nd of March, 1938, for which date a fresh summons was taken out. Unfortunately, this summons was served upon the defendant only on the 29th of March which is, it will be noticed, a week later than the date fixed for hearing. No further summons appears to have been taken out but on the 30th of April, 1938, the suit was taken up and an *ex parte* decree was passed against the defendant who did not appear on that date. On the 15th of June, 1938, the defendant applied to the Court for setting aside the *ex parte* decree with the result already mentioned.

The reason for the refusal of the learned Judge of the Court of Small Causes to set aside the *ex parte* decree was that the application was barred by limitation under Art. 164 of the Indian Limitation Act, 1908. In his affidavit in support of the application, the defendant urged—and it was not denied—that he had knowledge of the decree only on the 10th of May, 1938. If the period of 30 days fixed by the Limitation Act is calculated from the 10th of May, 1938, the application would be in time as the 9th of June, 1938, which was the last day of the period was a holiday and the Court did not sit until the 15th of June, 1938. But the learned Judge was of opinion that when the summons was served upon the defendant on the 29th of March, 1938, he became aware of the institution of the suit and he ought to have taken proper steps for ascertaining the final date for hearing. The learned Judge was apparently of the opinion that if steps had been taken and the enquiry proceeded, the defendant would have known that the suit had been fixed to the 30th of April, 1938. The learned Judge evidently regards this date as the starting point for the calculation of the period of limitation. I am unable to concur in this view.

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Art. 164 of the Indian Limitation Act which is the Article applicable to the present case fixes the point of time from which limitation is to run as follows:

"The date of the decree or, where the summons was not duly served, when the applicant has knowledge of the decree."

There are two alternative points of time indicated by the Art., (1) the date of the decree when a decree is passed after due service of summons or (2) the date on which the defendant had knowledge of the decree when the decree is one which had been passed without summons having been duly served upon him. The petitioner contends that it is the second clause that has application here, for according to him, this is a case where the summons was not duly served. He further contends that what is meant by knowledge in the article is actual knowledge and not merely the means of knowledge. The Article has reference to an application made under O. 9, r. 13, and it is therefore necessary to go to that rule for understanding the proper meaning to be given to the expression "duly served" both in that rule and in the article under consideration. I am aware that the same expression also occurs in O. 5, r. 19 but the meaning of the expression for the purpose of that rule different though it may be, can have no bearing on the construction of the article. The expression "duly served", if literally understood, would seem to have reference rather to the mode of service, than to the propriety of the summons where it fixes a day of hearing, on which it would be impossible for the defendant to appear. But the former can hardly be the sense in which the expression is used in O. 9, r. 13 of the Code. It is conceded, and I think rightly, that where the summons is served on a defendant too late to afford him a sufficient opportunity of appearing at the hearing of the suit, it is not a case of a summons "duly served", within the meaning of the section. In the present case, the date of the hearing was the 22nd of March, 1938 and the defendant was served, as I have said, a week later on the 29th of March, 1938. I am, therefore, satisfied that this is a case where the summons was not duly served.

The only question then is whether the learned Judge of the Court of Small Causes is right in interpreting the word "knowledge" appearing in the article as equivalent to "means of knowledge". The two things are, in my opinion, quite distinct

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and to say that they mean the same thing is doing violence to the language of the statute. The mere existence of the means of knowledge may in some cases lead irresistibly to the inference that the party had actual knowledge. But that is not the case here. The petitioner might have thought in perfect good faith, that in view of the late service, the Court would issue fresh summons fixing another date for the hearing. That is what I consider the Court should have done in the present case. The omission on the part of the petitioner to prosecute inquiry which might have led to a knowledge of the date of hearing cannot be regarded as culpable or wilful, so as to carry with it the consequences of knowledge. In the present case, the defendant must be held to have had knowledge of the decree only on the 10th of May, 1938, and his application was, therefore within time. The order of the learned Judge cannot therefore be sustained and must be set aside.

But this is a case in which it is eminently desirable that the defendant should be put upon terms. I see from an order passed by Lakshmana Rao, J., on the 18th October, 1938 that the stay of execution of the decree pending the disposal of the petition was granted on the condition that the petitioner deposited into Court on or before the 18th November, 1938 the sum of Rs. 2,200. Learned counsel for the respondent informs me that this order has not been complied with. In the circumstances of this case, I direct that the petitioner should deposit into Court the sum of Rs. 2,200 within a fortnight peremptory from this date; in default of such deposit the revision petition will stand dismissed with costs. If the defendant makes the deposit within the time limited the learned Judge in the Court below will take the suit back to his file and dispose of it according to law.

K. S. *Petition allowed conditionally.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE HAPPELL.

Srinivasa Aiyangar v. Ramanujachariar.

K. A. Srinivasa Ayyangar .. *Appellant (Appellant)*

v.

S. Ramanujachariar and others.. *Repondents (Repondents.)*

* L. P. A. No. 41 of 1938. 13th December, 1940.

Srinivasa Aiyangar v. Ramanujachariar.

Limitation—Right to conduct festival in a temple—Thengalais exercising right till 1909 and Vadagalais between 1910-1914—Order under Criminal Procedure Code, S. 144 restraining Thengalais from interfering—Absence of festivals between 1914-1927—Order under Criminal Procedure Code, S. 144 in 1930—Suit to obtain declaration that such order was illegal and that Vadagalais were not entitled to exclude Thengalais—If barred.

The Thengalais possessed and exercised the right to conduct a certain festival in a temple up to 1909 and the Vadagalais exercised such right from 1910-1914. An order under S. 144, Criminal Procedure Code was passed on 19th Decemder, 1914 restraining the Thengalais from interfering in the conduct of the festival. The order was effective for 19 days. From 1914-1927 the festival was not conducted and neither party was able to set up a claim against the other during that period. On 3rd January, 1930 a suit was filed by a Thengalai for a declaration that an order under S. 144 of the Code of Criminal Procedure which the Vadagalais had obtained that day was illegal and that the Vadagalais were not entitled to exercise any rights in connection with the temple to the exclusion of the Thengalais. On the question of limitation,

Held, that the interference by the Vadagalais with the right of the Thengalais to hold the festival not having been sufficiently long to give the Vadagalais any title, and the infringement being a recurring infringement, the Thengalais did not lose their right merely because they did not institute a suit in respect of the first infringement. Being a recurring infringement the plaintiff can take action whenever he desires so long as the defendants have not acquired a right by adverse possession.

Ponnu Nadar v. *Kumaru Reddiar*, (1935) I.L.R. 59 Mad. 75: 69 M.L.J. 739, distinguished.

Ramaswami Aiyangar v. *Adivarahachari*, (1940) 2 M.L.J. 990 (F.B.), applied.

Desirability of legislation on the question whether disputes with regard to temple ritual could be left to the decision of the Hindu Religious Endowment Board without right of recourse to the Courts pointed out.

Appeal under Clause 15 of the Letters Patent against the judgment and decree of the Hon'ble Mr. Justice King, dated 11th February, 1938 and passed in S. A. No. 721 of 1932 preferred to the High Court against the decree of the District Court of East Tanjore at Negapatam in A. S. No. 98 of 1931 preferred against the decree of the Court of the District Munsif of Nannilam in O. S. No. 3 of 1930 (O. S. No. 1 of 1930, D. M. C. Tiruvarur).

T. V. Muthukrishna Aiyar, V. N. Venkatavaradachari, T. R. Srinivasa Aiyangar and *S. Ramanujam* for Appellant.

K. S. Desikan and *R. Kesava Aiyangar* for Respondents.

The Court delivered the following

JUDGMENTS. *The Chief Justice.*—This appeal arises out of another dispute between the Thengalais and Vadagalais. In the village of Thirukkannamangai in the Tanjore District is a Leach, C. J.

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Thengalai temple known as the Sri Bakthavathsala Perumal Temple. The dispute is with reference to the twenty days' festival, which commences in the month of December and ends in January and is known as *Pagal Pathu* and *Ra Pathu*. It is common ground that up to 1909 the right to conduct the festival, including the right to recite the *Vedam*, *Mantrapushpam* and *Prabandam*, was possessed by the Thengalais. In 1900 a number of Vadagalais filed a suit (O. S. No. 506 of 1900) in the Court of the District Munsif of Tiruvarur for a declaration that a certain shrine in the temple had been dedicated to the spiritual leader of the Vadagalais and they obtained a decree, which was confirmed by this Court on the 25th November, 1909. The Vadagalais maintain that the decree finally decided that the right to conduct the festival is in them, but this the Thengalais strenuously deny. The effect of the decree is in dispute in the present suit, but for the purposes of deciding this Letters Patent appeal it is not necessary to consider this matter as the appeal only relates to a question of limitation. If the appellant succeeds in establishing his contention, that the suit is not time-barred the case will have to be remanded to King, J., from whose judgment the appeal has been preferred, for decision on the question whether the decree in O.S. No. 506 of 1900 operates as *res judicata*. On the passing of this Court's decree on the 17th November, 1909 the Vadagalais asserted that they had been given right to conduct the festival and on 19th January, 1911, they obtained from a Magistrate an order under S. 144 of the Code of Criminal Procedure preventing the Thengalais from interfering with them in the conduct of the festival which was then being held, and they obtained a similar order on the 19th December, 1914. There were other orders of a similar nature between these two dates, but it is not necessary to specify them.

After 1914 the festival was not held again until the year 1927. The trustee refused to allow it to be held. It has been suggested that the reason was that there were no funds available for the purpose, but I do not think that it is going too far to assign the real reason to a desire on the part of the trustee to avoid clashes between these antagonistic sects. The record does not show whether the festival which commenced in December, 1927, was conducted exclusively by the Vadagalais, but there is some indication that the Thengalais did participate

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for part of the time. There was no festival in the following year, but in 1929-30 the festival was again held and the Vadagalais appear to have had complete control. On the 3rd January, 1930, that is, while the 1929-30 festival was being held, the appellant, who is a Thengalai, filed the present suit in the Court of the District Munsif of Nannilam for a declaration that an order under S. 144 of the Code of Criminal Procedure, which the Vadagalais had obtained that day from the Sub-Magistrate of Kodavasal, was illegal and that the Vadagalais were not entitled to exercise any rights in connection with the temple to the exclusion of the Thengalais. The defendants pleaded limitation and *res judicata,* relying for the second plea on the decree passed in O S. No. 506. The District Munsif held that the suit was not barred and granted the declaration asked for by the appellant. On appeal the District Judge of East Tanjore held that the suit was not barred so far as it related to the first ten days of the festival, but that it was barred by the doctrine of *res judicata* so far as it concerned the second ten days. Both sides appealed and their appeals were heard by King, J., who held that Article 120 of the Limitation Act applied and that the suit was barred in its entirety by reason of the fact that it had not been instituted within six years of the 19th December, 1914, the date of the order passed by the Magistrate under S. 144 of the Criminal Procedure Code in that year. In these circumstances the learned Judge did not deal with the question whether the doctrine of *res judicata* had application.

The learned Judge considered that although the actual period of efficacy of the order of the 19th December, 1914 was only 19 days it had resulted in the interference with the rights of the Thengalais for at least thirteen years and that the case fell within the decision of this Court in *Ponnu Nadar* v. *Kumaru Reddiar.*[1] I find myself unable to concur in either of the reasons given by the learned Judge for holding that the suit was barred by the law of limitation. The order of the 19th December, 1914 had not interfered with the rights of the Thengalais for thirteen years. An order passed under S. 144 of the Code of Criminal Procedure can, at the most, be effective for two months, and in this particular case it was effective for only 19 days. The trustee was the person responsible for the

1. (1935) 69 M.L.J. 739; I.L.R. 59 Mad. 75.

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cancellation of the festival in the intervening years from 1914 to 1924 and neither party was able to set up a claim against the other during this period. The facts in *Ponnu Nadar* v. *Kumaru Reddiar*,[1] are altogether different from the facts in the present case. There certain Nadars sued to establish a right which they and their castemen claimed to pass in procession over certain public streets in the village in which they lived. Their right was denied by other villagers. In 1900 an order was passed by a Magistrate under S. 147 of the Code of Criminal Procedure directing that no organised procession of Shanars or Christians should pass along the route until a Civil Court had declared that there was a right to do so. The suit out of which the appeal arose was not filed until 1918. It was held that Art., 120 of the Limitation Act applied and that as the suit was not filed within six years of the order of 1900 it was out of time. On appeal it was contended that no rule of limitation would apply to such a case and that the right to use public streets, including the right to go in procession, was a natural right inherent in every member of the public, and could not be prescribed against or lost as other rights might be prescribed against or lost. Notwithstanding this contention it was held that the suit was governed by Art., 120. This decision may some day have to be reconsidered, but reconsideration is not called for now, because there is an important point of difference between that case and the present one. The order in that suit was of a permanent nature, being under S. 147 of the Code of Criminal Procedure while the order in the present suit was only of a temporary nature being under S. 144 and *Ponnu Nadar* v. *Kumaru Reddiar*,[1] is distinguishable on this ground.

It is manifest that the Vadagalais have not obtained a prescriptive right to conduct the festival. It has been suggested that the exercise of the right for a period of six years would give them a prescriptive right, but even if this argument were well founded—it is not necessary to decide the question—the Vadagalais would still not have acquired a prescriptive right. They conducted the festival in 1910, 1911, 1912, 1913 and 1914, but then there was an interruption until 1927 and this suit

1. (1935) 69 M.L.J. 739: I.L.R. 59 Mad. 75.

was filed in 1930. Therefore the Vadagalais have not conducted the festival for even six years in succession.

I have already mentioned that it is common ground that the Thengalais possessed the right to conduct the festival up to 1909 and their right to conduct it must still remain unless they have given it up, which is not the case, or they have lost it by reason of prescription, which is also not the case. Now a person who possesses a right such as we have here does not lose it because he does not institute a suit in respect of the first infringement of the right. If it is a recurring infringement he can take action whenever he desires so long as he remains the holder of the right. I consider that the decision of the Full Bench in *Ramaswami Aiyangar* v. *Adivarahachari*,[1] has application here. The question in that case was whether a lawful holder of an office who had not performed the duties of the office for forty years was precluded from filing a suit to enforce his rights because his status had been challenged. The plaintiff was the *mantrapushpakar* of a temple and the *archakas* of the temple were antagonistic to him. They had not, however, dispossessed him of the office, although they had made the position such that he was not willing to perform his duties. The Court held that he could abide his time for taking action. The interference which the *archakas* were guilty of had not affected his position as the lawful holder of the office. The *archakas* had not displaced him. The interference by the Vadagalais here with the right of the Thengalais to hold the festival has not been sufficiently long to confer title on the Vadagalais and this being the case the appellant was entitled to institute a suit when the Magistrate passed the order on the 1st January, 1930.

The result is that the appeal will be allowed and the case remitted to King, J., to decide the question of *res judicata* and any other question which may arise out of the appeal. The appellant is entitled to his costs in this Court. The costs of the hearing before King, J., will abide his final decision.

These unedifying disputes between the Thengalais and Vadagalais occupy much judicial time to the detriment of more deserving litigants. Most of the disputes relate to ritual and are merely sentimental in character. So much time is taken up

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1. (1940) 2 M.L.J. 990.

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in deciding disputes between these two sects to the prejudice of cases which possess merit that I consider that the Legislative authority might take into consideration the question whether disputes with regard to temple ritual could be left to the decision of the Hindu Religious Endowments Board without the right of recourse to the Courts.

Happell, J.

Happell, J.:—I agree with my Lord the Chief Justice.

K. S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATARAMANA RAO.

Marina Ammayi .. *Appellant** (*Plaintiff*)

v.

The Secretary of State for India in Council, represented by the Collector of East Godavari at Cocanada and others. *Repondents* (*Defendants*).

Marina Ammayi v. Secretary of State for India in Council.

Civil Procedure Code (*V of* 1908), S. 80—"*Two months next after notice*"—*Computation—Plea as to absence of proper notice—If can be waived.*

S. 80 of the Civil Procedure Code is explicit and mandatory and provides that no suit should be instituted till after the expiry of two months after delivery of the notice. In computing the period of two months, the day of the delivery of the notice to the Secretary to the Provincial Government or the Collector of the district must be excluded. A suit filed before the expiry of the full two months is premature and ought to be dismissed.

Held further, that having regard to the imperative provisions of the statute it is not open to the Collector to waive the plea as to the want of proper notice under S. 80.

Gaekwar, Baroda State Railway v. *Hafiz Habib Ul-Haq*, I.L.R. 1938 All. 601: 65 I.A. 182: (1938) 2 M.L.J. 11 (P C), applied.

Appeal against the decree of the District Court of East Godavari at Rajahmundry in A. S. No. 140 of 1936 preferred against the decree of the Court of the Subordinate Judge of Amalapuram in O. S. No. 72 of 1932.

G. Lakshmanna and *G. Chandrasekhara Sastri* for Appellant.

The Government Pleader (*B. Sitarama Rao*), *P. Satyanarayana Raju* and *P. Somasundaram* for Respondents.

The Court delivered the following

JUDGMENT:—The question for decision is whether the suit out of which this second appeal arises is liable to be dismissed

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* S. A. No. 553 of 1937 30th August, 1940.

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for want of proper notice under S. 80, Civil Procedure Code. Both the lower Courts dismissed the suit. The question now is whether the dismissal is proper.

The notice of suit given to the Collector was dated the 20th October, 1932. Both the Courts have concurrently found that the notice was served on the 21st October, 1932. The suit was instituted on the 21st December, 1932. In the plaint the allegation is that the first defendant, the Secretary of State for India represented by the Collector of East Godavari acknowledged the notice on the 21st October, but however failed to comply with the demand therein. The plaintiff claimed exemption of the two months' time occupied by reason of the said notice. The reply of the Collector on behalf of the Secretary of State was that the amount of claim was not mentioned in the said notice and the suit was bad for want of proper notice. The following issue was raised:

"Whether the suit is not maintainable for want of proper notice under S. 80, Civil Procedure Code."

When the case was taken up for trial, the Secretary of State under a mistaken impression contended that the notice was served on him on 22nd October, 1932 and the learned Subordinate Judge accepted this contention but his decision was reversed on appeal on the ground that notice was actually delivered at the Collector's office on 21st October, 1932 and in remanding the appeal the learned District Judge remarked thus:

" It was contended by the Government Pleader that even if the notice had really been received on 21st October, 1932 the suit filed on 21st December, 1932 would still be within two months of the date of the receipt of the original notice. This point too does not appear to have been brought to the notice of the learned Subordinate Judge. I consider that the disposal of the suit in the lower Court is unsatisfactory in the sense that none of these points have been adjudicated upon."

The learned Subordinate Judge who dealt with the case after remand came to the conclusion that the suit having been filed within two months of the date of receipt of the notice, the provisions of S. 80, Civil Procedure Code were not complied with. He therefore, dismissed the suit. On appeal the learned District Judge concurred in this view.

Mr. Lakshmanna on behalf of the plaintiff-appellant contends that this view is wrong. He submits that both the lower Courts have wrongly construed S. 80, Civil Procedure Code

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and in computing the period of two months the day on which notice was served ought to have been included and not excluded and that if it was so included, the suit was in compliance with S. 80, Civil Procedure Code. He further contends that in any event it must be held that the Government has waived this specific plea. S. 80, Civil Procedure Code so far as it is relevant for the present discussion runs thus:

"No suit shall be instituted against the Crown, or against a public officer in respect of any act purporting to be done by such public officer in his official capacity, until the expiration of two months next after notice in writing has been, in the case of a suit against a Provincial Government delivered to, or left at the Office of a Secretary to that Government or the Collector of the District........"

This section therefore provides a condition precedent to the institution of a suit. As observed by their Lordships of the Privy Council in *Bhagchand Dagadusa* v. *Secretary of State for India*,[1] S. 80 Civil Procedure Code is explicit and mandatory. If the suit is filed before the expiration of two months after notice had been delivered or left at the Office of the Collector, it is not maintainable and the Court is bound to dismiss it. The question therefore is whether two months expired after the notice in question was served on the Collector. The language of the section indicates that there must be full two months after delivery of the notice. This in my opinion follows from the use of the words 'next after'. It seems to me the principle that ought to be applied in construing this section is that whenever a period of time is to be computed from or after an act done or an event happened, the day on which the act was done or the event happened should be excluded. In *Blunt* v. *Heslop*,[2] an action was filed by an attorney for recovery of an amount due to him from his client. The defence was that the action was premature. It was based on statute, 2 Geo. II C. 23, S. 23, which provided that:

"No attorney or solicitor shall commence any action for the recovery of any fees, charges, or disbursements at law or in equity until the expiration of one month or more after such attorney or solicitor respectively shall have delivered unto the party or parties to be charged therewith, or left for him, her or them, at his, her or their dwelling house or last place of abode, a bill."

The bill was delivered on the 12th January, 1886 and the action was commenced on the ensuing 9th of February. The

1. (1927) 53 M.L.J. 18: I.L.R. 51 Bom. 725 at 747.
2. (1838) 8 Adol & Ellis 577: L.R. 112 E.R. 957.

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contention of Mr. Alexander on behalf of the defendant was that the words of the statute "the expiration of one month or more after" imply exclusion. This, contention was upheld and the plaintiff was non-suited. Littledale, J., observed thus:

"The words being 'one month or more' we must suppose that the client was intended to have a full month after the delivery of the bill."

Patterson, J., observed as follows:

"Whatever may be the case where the thing is to be done 'within' such a time after an act done, Mr. Alexander's construction is correct here, where the action is not to be brought 'until the expiration of one month or more after' the delivery of the bill."

In *Young* v. *Higgon*,[1] the action was for trespass against the defendant, a Magistrate, for breaking and entering the plaintiff's dwelling house and seizing his goods. Under 24 Geo. II, C. 44, S. 1, notice of suit was necessary and the section ran thus:

"No writ shall be sued out against, nor any copy of any process at the suit of a subject shall be served on any Justice of the Peace for anything done in the execution of his office until notice in writing of such intended writ or process shall have been delivered to him etc., at least one calendar month before the suing out or serving the same."

The notice in that case was served on the 26th March, 1838 and the suit was filed on the 26th of April, and it was held that the action was premature. Baron Parke observed thus:

"When time for a particular period is allowed to a party to do any act, the first day is to be reckoned exclusively."

Baron Alderson agreed with him in that opinion and remarked thus:

"Where there is given to a party a certain space of time to do some act, which space of time is included between two other acts to be done by another person, both the days of doing those acts ought to be excluded, in order to ensure to him the whole of that space of time. Here is a case in which one party is required to give notice to another a certain time before a particular act can be done by the former; the party to whom the notice is given cannot fix the period of the day when it is to be given; but the Act of Parliament allows him a month, as an intervening period 'within' which he may deliberate whether he will do a certain act, viz., tender amends; and unless you exclude both the first and the last day, you do not give him a whole month for that purpose."

In the present case the statute allows two months' time within which the Secretary of State can deliberate whether he will comply with the demand made in the notice. In *Lester* v. *Garland*,[2] the question arose with reference to a will. Certain

1. (1840) 6 Meeson and Welsby's Reports, 49: L.R. 151 E.R. 317.
2. (1808) 15 Ves. Jun. 247: 33 E.R. 748.

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properties were devised in trust to the following effect: in case A shall within six calendar months after the testator's decease give secutrity not to marry B, then, and not otherwise, to pay to the children of A; with a proviso to go over, if she shall refuse or neglect to give such security. The testator died on the 12th January and security was given on the 12th July. It was held that the condition precedent of giving security within six months was satisfied on the ground that the day of the testator's death must be excluded from the computation of six months. Sir William Grant observed thus:

"It is not necessary to lay down any general rule upon this subject; but upon technical reasoning I rather think, it would be more easy to maintain, that the day of an act done, or an event happening, ought in all cases to be excluded, than that it should in all cases be included. Our law rejects fractions of a day more generally than the Civil law does. The effect is to render the day a sort of indivisible point; so that any act, done in the compass of it, is no more referable to any one, than to any other, portion of it; but the act and the day are co-extensive; and, therefore, the act cannot properly be said to be passed, until the day is passed........In the present case the technical rule forbids us to consider the hour of the testator's death at the time of his death for that would be making a fraction of a day. The day of the death must therefore be the time of the death; and that time must be past, before the six months can begin to run. The rule, contended for on behalf of the plaintiffs, has the effect of throwing back the event into a day, upon which it did not happen; considering the testator as dead upon the 11th, instead of the 12th of January, for it is said, the whole of the 12th is to be computed as one of the days subsequent to his death. There seems to be no alternative but either to take, the actual instant, or the entire day, as the time of his death; and not to begin the computation from the preceding day."

The principle of these decisions was applied and followed in In re *Railway Sleepers Supply Company.*[1] When as here, the statute says that no suit should be instituted till after the expiry of two months after the doing of a particular act, that is, in this case the delivery of the notice, the day of the delivery must be excluded.

Following the principle of the above decisions, I would hold that the suit was premature and ought to be dismissed.

The next question is whether there has been a waiver of the plea. Mr. Lakshmanna has not been able to put forward any argument to convince me that the plea has been waived in this case. The Secretary of State has pleaded that the notice was not a proper notice. No doubt the specific plea as to the suit not having been instituted within two months was not

1. (1885) 29 Ch. D. 204.

taken but the plaintiff has to make out that he has complied with the provisions of the section because it is a condition precedent to the institution of the suit. Further, having regard to the imperative provisions of the statute it is not open to the Collector to waive this plea. If authority is needed, I would refer to the recent decision of the Privy Council in *Gaekwar, Baroda State Railway* v. *Hafiz Habib Ul-Haq*[1] where their Lordships dealing with the provisions of Ss. 86 and 87, Civil Procedure Code observed thus:

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"As already pointed out, the provisions relating to this matter are statutory. They are contained in Ss. 86 and 87 of the Code of Civil Procedure, they are imperative, and having regard to the public purposes which they serve, they cannot, in their Lordships' opinion, be waived in the manner suggested by the High Court."

I, therefore, hold that it would not be open to the Secretary of State to waive this plea.

In the result the Second Appeal fails and is dismissed but having regard to the circumstances of this case, I direct each party to bear his own costs throughout. Leave to appeal refused.

K. S. *Appeal dismissed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, MR. JUSTICE GENTLE AND MR. JUSTICE KRISHNASWAMI AIYANGAR.

Pechiyappa Chettiar .. *Petitioner* (Plaintiff)*

v.

Vazhukka Chetti .. *Respondent (Defendant).*

Madras Agriculturists' Relief Act (IV of 1938), S. 15—Applicability—Tenancy ceasing before fasli 1347—Benefits under section—If available to tenant.

F.B. Pechiyappa Chettiar v. Vazhukka Chetti.

When a tenancy has ceased to exist before the commencement of fasli 1347, S. 15 of Act IV of 1938 is not applicable and the tenant is not entitled to the benefits under the section. A tenancy in and payment of rent for fasli 1347 is a condition precedent to obtaining relief in respect of fasli 1345 and earlier years.

Petition under S. 25 of Act IX of 1887 praying that the High Court will be pleased to revise the decree of the Court of the District Munsif of Palghat in S. C. S. No. 902 of 1937.

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1. (1938) 2 M.L.J. 11: I.L.R. 1938 All. 601: L.R. 65 I.A. 182 (P.C.).

* C. R. P. No. 880 of 1938. 10th December, 1940.

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C. K. Visvanatha Aiyar for Petitioner.

C. V. Mahadeva Aiyar for Respondent.

The Court delivered the following

JUDGMENTS. *The Chief Justice.*—The question raised in this petition is whether S. 15 of the Madras Agriculturists' Relief Act, 1938 applies in a case where there was no tenancy in existence in fasli 1347, that is during the year commencing from the 1st July, 1937, and ending with the 30th June, 1938. So much of the section as is relevant here reads as follows:

"All rent payable by an agriculturist to a landholder or an undertenure holder under the Madras Estates Land Act, 1908, or to a jenmi or intermediary under the Malabar Tenancy Act, 1929, which has accrued for the fasli year 1345 and prior faslis and which is outstanding on the date of the commencement of this Act shall be deemed to be discharged whether the rent be due as such or whether a decree has been obtained therefor;

Provided that where the person liable to pay rent (hereinafter in this section referred to as 'tenant') does not, on or before the 30th September, 1939, pay up all arrears of rent accrued in respect of any holding for faslis 1346 and 1347, the arrears of rent for fasli 1345 and prior faslis which were outstanding in respect of the same holding on the date of the commencement of this Act shall be deemed to be discharged only in the same proportion as the rent due for faslis 1346 and 1347 which is paid up by the ryot or tenant bears to the rent due for those two faslis;

Provided further that no tenant shall be entitled to the benefit of this section unless he shall have paid in respect of the holding, the rent due for fasli 1347 on or before the 30th September, 1938."

These provisions have been differently interpreted by two Division Benches of this Court. In *Kotithodi Ahmedkutty Haji* v. *Ramachandra Aiyar*,[1] Burn and Lakshmana Rao, JJ., held that the section only applied, if a tenancy was subsisting in fasli 1347. In *Patteri Pakker* v. *Kunhi Tharuvayi*,[2] Wadsworth and Patanjali Sastri, JJ., expressed the opinion that the section did not contemplate merely a continuing tenancy and that a person who had ceased to be a tenant for fasli 1347 could obtain the benefit of the Act in respect of rent which had accrued due for fasli 1345 and earlier faslis. In their judgment Burn and Lakshmana Rao, JJ., did not set out their reasons and merely dismissed the appeal which came before them under O. 41, r. 11 of the the Code of Civil Procedure, but the position had been clearly stated in the order of the Subordinate Judge and in dismissing the appeal under O. 41, r. 11, the learned Judges indicated their unqualified approval of

1. A. A. O. 462 of 1939.
2. C. R. P. No. 767 of 1939.

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the view of the Subordinate Judge. In his order the Subordinate Judge said that the provisos to the first clause of S. 15 made it clear that before a tenant can claim the benefit of that clause he must have been a tenant on the date when the Act came into force. Wadsworth and Patanjali Sastri, JJ., considered that to disqualify a tenant from getting the relief merely because rent ceased to be due in respect of the holding in the course of fasli 1347 seemed to go beyond the words of the provisos.

In my judgment Burn and Lakshmana Rao, JJ., took the correct view of the section. I consider that the first proviso indicates that here the Act is concerned with a continuing tenancy, but it seems to me that the matter is put beyond doubt by the second proviso which states, without the slightest ambiguity, that a tenant shall not be entitled to the benefit of S 15 unless he shall have paid rent in respect of his holding for fasli 1347. I can only give this proviso the meaning which the words imply and to my mind its effect is that a tenancy in 1347 is a condition precedent to relief under the section. It may possibly have been the intention of the Legislature to give relief to a tenant whose tenancy has ceased before the 1st July, 1937, but it has not said so; in fact, it has said the direct opposite. If the section as it stands does not express the intention of the Legislative authority, the Legislative authority can amend the section. The Court cannot amend it; it can only have regard to the language used. For these reasons I hold that the section does not apply when a tenancy has ceased to exist before the commencement of fasli 1347.

In this case the District Munsif of Palghat dismissed the petitioner's suit on the ground that there was no rent owing to the petitioner, after applying the provisions of the Act for scaling down the debt due by the respondent. In the view I take, the case should be sent to the District Munsif to decide it in the light of this judgment. The petitioner is entitled to his costs.

Gentle, J.

Gentle J.:—I agree but desire to add a few words. Apart from the provisions of Act IV of 1938 the respondent is liable to pay to the petitioner the rent of the holding for fasli 1345, subject to any contention that there has been a previous discharge. Relief from this payment is given by S. 15 (1) of the Act, and in order to obtain the relief the respondent must

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bring himself within the statutory provisions, fulfilment of which is required before relief can be obtained. The second proviso to S. 15 (1) indicates that no tenant shall be entitled to the benefit of the section unless he shall have paid the rent due for fasli 1347 in respect of the holding. In my view payment of rent for fasli 1347 is a condition precedent to obtaining relief in respect of fasli 1345 and earlier years. Since the respondent has not fulfilled this condition precedent he cannot bring himself within the provisions of S. 15 and is not entitled to the relief which the section gives by the money or rent owing to the petitioner being deemed to have been discharged.

Krishnaswami Aiyangar, J.

Krishnaswami Aiyangar, J.:—I defer to the opinion of my Lord which has also been concurred in by Gentle, J. I own to a certain amount of doubt still lingering in my mind but it is not sufficiently strong to persuade me to take a different view.

K. S. *Case remanded.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, MR. JUSTICE VENKATARAMANA RAO AND MR. JUSTICE KRISHNASWAMI AIYANGAR.

Chelikani Kondayya Rao and others... *Appellants** (*Plaintiffs*)

v.

Uppalapati Naganna and others ... *Respondents* (*Defendants*).

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Madras Estates Land Act (*IX of* 1908), *Ss.* 181 *and* 187 (1) (c)—*Amendment of* 1934—*Terms of lease granting* kudivaram *right to vendee—Nature of tenure—Other clauses in the deed repugnant to* ryoti *tenure—Construction of deed—Principles to be adhered to in construction.*

Where the question related to the true construction of a '*khat*' or counterpart of a lease, embodying the terms of a contract which after reciting that the appellants had agreed to sell to the respondent the *kudivaram* right in the lands provided: "you have hereby sold to us all the rights possessed by you in the said lands excepting the *melwaram* rights thereto. Therefore, in the matter of our enjoying the said lands henceforth from son to grandson and so on in succession with powers of alienation by way of gift, exchange sale etc., you or your heirs shall never raise dispute either with us or with our heirs", and the deed further stipulated by one clause for the payment of a fixed rent, by another for the payment of interest at 10 annas per cent per mensem on arrears of rent, by a third that the *cist* payable to the landholder should be a first charge on the land and by yet another that the appellants should be

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* L. P. A. No. 51 of 1939. 2nd December, 1940.

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entitled to the trees on the land on that date but that those grown after that date should belong to the respondent etc.,

Held, by The Chief Justice and Venkataramana Rao, J., that where a landholder possessed private lands within an 'estate' and sold the *kudivaram* right in those lands retaining the *melwaram*, he should be deemed to have converted the lands into ryoti lands, and additional terms in the deed of sale would not alter the nature of the transaction Such terms would stand, provided they were not inconsistent with what the statute stated should apply to *ryoti* tenure. To the extent that the additional terms were inconsistent with *ryoti* tenure, they should be regarded as void. The appellants here could have sold the lands in the suit to the first respondent absolutely or they could have leased them at any rent they might have agreed upon without separating the *kudivaram* right from the *melwaram* right, but as they chose to separate the *kudivaram* right from the *melwaram* right and grant a permanent right of occupancy on the basis of the payment relating to the *melwaram* right, they should be deemed to have converted the lands into *ryoti* lands.

Per Krishnaswami Aiyangar, J., (dissenting)

The clauses relating to the fixity of rent and payment of interest on arrears specifically agreed to and undoubtedly intended to be operative, created incidents which were not only foreign to *ryoti* tenure under the Act, but materially opposed to it. It is not for the Court to evaluate the terms of a deed for the purpose of accepting some and rejecting others. On the contrary every rule of law and every rule of equity would seem to prohibit its doing so. It is not correct for a Court to infer a tenure by taking into account some only of the terms of a contract ignoring others, when it is possible, and it is permissible to give effect to all the terms by treating it as a special contract and one not entered into for the purpose of impressing a *ryoti* tenure on the land composed in the '*khat*.'

Rajendramani Devi Garu v. Yellappa Ramu Naidu, (1920) 39 M.L.J. 565 referred to.

Appeal under Cl. 15 of the Letters Patent against the judgment of the Honourable Mr. Justice Wadsworth dated 19th July, 1939 and passed in A. A. O. No. 202 of 1938 preferred to the High Court against the order of the Court of the Subordinate Judge of Masulipatam dated 11th October, 1937 and passed in O. S. No. 11 of 1934.

V. Rangachari for Appellants.

K. Kameswara Rao for Respondents.

The Court delivered the following

JUDGMENTS. *The Chief Justice.*—The appellants are the *mokhasadars* of a village falling within the jurisdiction of the Subordinate Judge of Masulipatam. On the 7th October, 1920, they sold to the first respondent the *kudivaram* right in their *kambattam*, or home farm lands, on conditions to which I shall refer in some detail presently. On the 31st March, 1934, the Leach, C. J.

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appellants filed a suit in the Court of the Subordinate Judge of Masulipatam for the recovery of the rent due by the sale of the lands. It was contended by the respondents that by the deed of the 7th October, 1920, the appellants had converted the lands from *kambattam* into *ryoti* lands and consequently the Revenue Court, not the Civil Court, had jurisdiction. Before the Subordinate Judge the appellants admitted that the village was an "estate" within the meaning of the Madras Estates Land Act, 1908, as amended in 1936, but they averred that the village was not an estate within the meaning of the Act as it stood at the time of the contract with the first respondent, and an issue was framed on the question. It is, however, impossible for the appellants to maintain this contention. By admitting that the lands in suit are *kambattam* lands within a *mokhasa* village, it follows that the village was an "estate" within the meaning of the Madras Estates Land Act, even before the amendment in 1936, and the appeal must proceed on this basis. The Subordinate Judge upheld the respondents' contention that there had been a conversion and dismissed the suit. On appeal to this Court, Wadsworth, J., concurred in these decisions and this appeal is from his judgment.

S. 181 of the Madras Estates Land Act before the amendment of the Act stated that nothing in Ss. 6, 8, 10, 11, 12, 19 and 46 should confer a right of occupancy in, or should apply in any way to, a landholder's private land. Then followed a proviso to the effect that nothing contained in the section should prevent a landholder from converting his private land into *ryoti* land. Until private land was converted into *ryoti* land the landholder could deal with it as he liked and that is still the position, although the wording of the section has been altered. S. 19 has throughout been to the effect that except as provided in the Act, the relations between a landholder and a tenant of his private land are not regulated by the Act. There was nothing in the Act as it stood before 1936, nor is there anything in it now, which prevents a landholder from leasing his private land on whatever terms he may think fit, but, of course, if he leases it on terms which imply a conversion of the land into *ryoti* land all the provisions of the Act with regard to *ryoti* land will apply and will overrule any provisions in the lease which are in conflict with the provisions of the Act. I may here mention that apart from S. 181 the amended Act is on all fours

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with the measure as it stood before 1936 so far as this case is concerned.

In *Rajendramani Devi Garu* v. *Yellappa Ramu Naidu*,[1] a Division Bench of this Court had to consider the terms of a conversion of private land into *ryoti* land and the judgment appears to go to the length of saying that the terms of a conversion can be enforced even if they are inconsistent with *ryoti* tenure. It was observed that S. 181 contemplated a conversion from home farm land into *ryoti* land, but that the Legislature had not made any special provision with regard to the terms on which the conversion might be made. It was on this line of reasoning that the Court held that the contract between the parties was enforceable. In my opinion this is going much too far. When there is a conversion of private land into *ryoti* land the terms of the contract which are not inconsistent with *ryoti* tenure can be enforced, but once the conversion has taken place the tenant has all the rights given to a *ryot* by the Act, and if the rent fixed is unfair the remedies contemplated by the Act are open to him.

The sole question in this case is whether the instrument of the 7th October, 1920, operated to convert the appellants' *kambattam* lands into ryoti lands. The *khat* executed by the vendee embodying the terms of the contract, after reciting that the appellants had agreed to sell to him the *kudivaram* right in the lands for Rs. 33,492, and that they had received the purchase consideration, proceeds:

> "You have hereby sold to us all the rights possessed by you in the said lands excepting the *melwaram* rights thereto. Therefore, in the matter of our enjoying the said lands henceforth from son to grandson and so on in succession with powers of alienation by way of gift, exchange, sale, etc., you or your heirs shall never raise dispute either with us or with our heirs."

Then follow the other terms relating to the sale and these are set out in clauses numbered 1 to 10. It is only necessary to refer to the first, second, third and ninth clauses, as the others have not been referred to in argument and obviously have no bearing on the question under discussion. The first clause stipulates for the payment of a fixed rent and the second clause for the payment of interest at ten annas per cent. per mensem on arrears of rent. The third clause provides that the *cist* payable to the landholder shall be a first charge on the land, and the ninth clause states that the appellants shall be entitled to the

1. (1920) 39 M.L.J 565.

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trees standing on the land at the time of the contract, but trees grown after that date shall belong to the first respondent. It is suggested that these terms are inconsistent with *ryoti* tenure and therefore the document cannot be read as converting the land into *ryoti* land, but only as a special contract relating to private land. The document must be read as a whole in order to gauge its effect and when this is done I consider that it must be held that there has been a conversion. The main characteristic of *ryoti* tenure is the permanent vesting in the tenant of the *kudivaram* right and the permanent retention of the *melwaram* right by the landholder. That is the position here. By virtue of the contract the *kudiwaram* right was transferred absolutely to the first respondent and he obtained permanent rights of occupancy on the terms set out in the contract. It is conceded by the learned advocate for the appellants that if the document had stopped at the sale of the *kudivaram* right there would have been a conversion within the meaning of S. 181. I can see nothing in clauses 1, 2, 3 and 9 which alters the position. If the document had stopped merely with the sale of the *kudivaram* right it would still have been necessary to fix the rent payable to the appellants as the possessors of the *melwaram* right, and the fact that the rent was fixed in the contract without contemplation of any change in the rate does not alter the position. The landholder and the tenant may agree on a permanent rent, but if they do this does not take away the right of the tenant to sue or apply for a reduction of the rent if the lands have been converted into *ryoti* lands. S. 187 (1) (c) says so. Nor is the provision with regard to the payment of interest inconsistent with *ryoti* tenure. The payment of interest on arrears of rent is expressly provided for in the Act. Under S. 61 an arrear of rent shall bear simple interest at the rate of one half per cent. per mensem from the date on which the arrear fell due until it is liquidated. Therefore, cl. 2 of the additional terms is in full accord with the Act, except that the rate is higher. Again this contingency is expressly provided for. Sub-S. 2 of S. 187 says that nothing in any contract between a landholder and a ryot made after the passing of the Act shall affect the provisions of S. 61 relating to interest payable on arrears of rent so as to increase the amount payable. The only comment that the learned advocate for the appellants has to make on cl. 3 is that the *cist* payable to the appellants is

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made a first charge on the lands only and not on the lands and produce which the Act would allow. The freeing of the charge on the produce is, however, a concession to the tenant and there is nothing in the Act which prevents a landholder making a concession to his tenant. The appellants receive no help from cl. 9. The trees belonged to the appellants and without this clause would have passed to the first respondent. The Act does not prohibit a tenant conceding to the landholder the right to the trees on the land, and on a conversion of private lands into *ryoti* lands the parties can contract as they please so far as the trees are concerned.

In my opinion where a landholder possesses private lands within an "estate" and sells the *kudivaram* right in those lands but retains the *melwaram* right he must be deemed to have converted the lands into *ryoti* lands, and additional terms will not alter the nature of the transaction. The additional terms will stand, provided that they are not inconsistent with what the statute states shall apply to *ryoti* tenure. To the extent that the additional terms are inconsistent with *ryoti* tenure they must be regarded as being void. The argument which has been advanced that this interferes with the right of the landholder to contract freely with regard to his private lands seems to me to be beside the question. The landholder does not need to enter into a contract which will have the effect of converting his private lands into *ryoti* lands, but if he does contract and the tenure which he creates amounts to *ryoti* tenure he must accept all the consequences of his action. The appellants here could have sold the lands in suit to the first respondent absolutely or they could have leased them at any rent they might have agreed upon without separating the *kudivaram* right from the *melwaram* right, but as they chose to separate the *kudivaram* right from the *melwaram* right and grant a permanent right of occupancy on the basis of the payment of rent relative to the *melwaram* right they must, in my judgment, be deemed to have converted the lands into *ryoti* lands.

For these reasons I would dismiss the appeal with costs.

Venkataramana Rao, J.

Venkataramana Rao, J:—I agree.

Krishnaswami Aiyangar, J.

Krishnaswami Aiyangar, J:—With much reluctance, I feel myself obliged to differ from the opinion expressed by my learned colleagues.

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The question with which we are faced in this case relates to the true construction of a *khat* or counterpart of a lease, embodying the terms of a contract entered into between the appellants and the respondents on the 7th October, 1920. By that contract, the appellants, who owned a parcel of private land in an estate belonging to them, sold to the respondents, the *kudivaram* interest alone in it retaining the *melwaram* interest for themselves. There are in the deed, certain other terms and conditions to some of which a reference is necessary, for a correct decision, but there can be no doubt that the dominant object in the mind of the parties was to convey to the respondents the *kudivaram* right in the land. This is not indeed disputed, but what is disputed is, whether there has been a conversion effected by the instrument of what was admittedly the appellant's private land into *ryoti* so as to confer on the respondents those rights and privileges which are recognised by the Madras Estates Land Act, 1908, as inhering in a ryot holding ryoti land in an estate.

That the legal incidents which appertain to private land in an estate essentially differ from those annexed to ryoti land is too plain for argument; in fact it is a matter of concession. The differences are fundamental, the Act drawing a sharp distinction between the two classes of land. Private land is to borrow a word from the English Law of Real Property, the freehold of the landholder over which he has absolute unrestricted dominion. He can deal with it in any manner he likes, enter into any kind of contract he chooses and create any form of tenure in it he pleases. S. 19 of the Act preserves to him an unfettered freedom of contract as regards this class of land, a privilege not recognised in respect of any other class of land within the estate. It declares in explicit terms that the relations between a landholder and a *tenant* and be it noted, not a ryot of his private land are not to be regarded as regulated by the provisions of the Act. Language cannot be plainer. Even the name 'ryot' is here avoided when referring to the person who cultivates the private land, and the colourless term *tenant* seems deliberately to be adopted.

The only way by which the landholder can make those provisions applicable, is by converting his private land into ryoti land and conferring occupancy right in the land, so converted. Such a course was permitted by S. 181 as it stood

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before the amendment made by Act VIII of 1934. The section ran as follows:

"Nothing in Ss 6, 8, 10, 11, 12, 19 and 46 shall confer a right of occupancy in or shall apply in any way to, a landholder's private land.

Provided that nothing contained in this section shall prevent a landholder from converting his private land into ryoti land."

Of the sections enumerated here all except S. 16, relate to the acquisition, or transfer of occupancy rights, or to the limitations subject to which these rights are to be enjoyed in lands other than private lands. S. 19 as already seen, was enacted to preserve the rights of the landholder in the latter category of land. Reading S. 181 together with its proviso the meaning is clear that the landholder could if he chose convert his private land into ryoti land with a view to confer occupancy right in it, and could also confer such a right. It was the same meaning that has been made plainer by the amendment introduced into the section in 1934. The effect of the amendment is not to make a change in the law, but only to make the meaning more explicit than before, and this was not denied at the bar during the arguments. The section as now amended enacts that:

"A landholder shall be at liberty to convert his private land into ryoti land and confer occupancy right in land so converted."

On a literal interpretation, two steps or processes seem to be necessary before the tenant can claim the rights and privileges of a ryot, in land which was originally private land; *first*, a conversion from the one class to the other and *second*, the grant of occupancy right in the land after conversion. The amended section which may well be regarded as merely declaratory of the law as it was before the amendment thus appears to warrant the view that the mere grant of occupancy right in private land does not by itself suffice to alter its character unless it is preceded by an act of conversion. There is no objection, however, to the conversion and the grant being made by one and the same instrument provided the intention is made sufficiently clear.

The real question then is not whether permanent rights of occupancy have been granted by the *khat*, which of course it does, but whether the landholder had also fulfilled what appears to me to be a necessary condition precedent, namely, the conversion of his private land into ryoti land. It is necessary in my view to keep the two things separate in order to avoid

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falling into a possible error. On a question of this kind there is no presumption one way or the other and it, therefore, lies on the party who sets up a case of conversion to make it out. If he wholly fails, or only succeeds to the extent of creating a doubt, he derives no benefit out of it, and must fail. The question is obviously one of intention to be deduced or inferred from a consideration of the entire deed, bringing into action every part of it and rejecting none, unless the expressions are contradictory and incapable of being reconciled, or there is a repugnancy which calls for the rejection of one part in order the more effectually to carry into effect the real intention of the parties gatherable from the part retained. The rule is thus stated by Kelly, C. B., in *Gwyn* v. *Neath Canal Co.*,[1]:

> "The result of all the authorities is that when a Court of law can clearly collect from the language within the four corners of a deed, or instrument in writing, the real intention of the parties, they are bound to give effect to it by supplying anything necessarily to be inferred from the terms used and by rejecting as superfluous whatever is repugnant to the intention, so discerned."

Rejection should be the last resort, after every means to reconcile are exhausted. There is ample authority also for the proposition that the Court should rather lean towards a construction which would give a meaning and effect to every one of the clauses in a deed than towards one which would result in a nullification of any one or more of them in the end. These are some of the principles of general application which I should bear in mind in approaching the construction of a written instrument.

It is to be observed at the outset, that in the deed in question, there are no doubtful words or ambiguous expressions, no terms of technical import and no repugnant clauses. The language is plain, and the meaning is clear; and the intention behind each one of the clauses whether taken separately or in combination is easily gathered and creates no difficulty. Nor have I any doubt that the parties intended to make all of them equally operative, and binding so that their future relations may wholly be governed by them. We should hesitate to accept a construction which will result in that intention being abrogated in whole or in part.

I readily grant that a necessity for such a course may arise, in the class of cases envisaged by Kay, J., in

1. (1868) L.R. 3 Ex. 209, 215.

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Pawsey v. *Armstrong*,[1] where he observed:

"The truth is that there are certain legal relations which are entered into by agreeing to certain conditions, and when those conditions are agreed to, it is quite idle for people to superadd, or to attempt to superadd, a stipulation that the necessary legal consequences of those conditions shall not follow from the arrangement."

Such a stipulation may have to be ignored but not before fully satisfying ourselves that the necessary conditions are made out for the excision. An illustration of this principle is to be found in the case where the relationship of partners must be held established by law between persons who have agreed to share the profits of a business carried on by all or any of them acting for all in spite of the superimposition of a contrary term in the articles. The proposition, however, can have no application except in a case where all and not some only of the conditions requisite for constituting the relationship are present. If the conditions fall short or are of a character, which indicates a different relationship, the proposition cannot apply.

I am quite unable to agree that the governing consideration lies in the fact that the landholder has in the case on hand parted with the *kudivaram* right in the land retaining with himself the *melwaram* interest only. Had the expression "*kudivaram*" been declared by statute to connote *ryoti* tenure or if I could persuade myself that it is a technical word, a term of art, having the same legal import, I should readily assent to the proposition. That, however, is not the case. It is quite clear that the word has been used in the Act (*e.g.*, S. 3 (2) (*d*) in a non-technical sense to denote the kind of tenure held by a tenant who has a permanent right of occupancy. In its literal sense, the word *kudivaram* only means the cultivator's share of the produce, the word *melwaram* meaning the landholder's share *Suryanarayana* v. *Patanna*,[2] *Venkata Sastrulu* v. *Seetharamudu*[3]. It is customary however to speak of the ownership of land in this Province as being composed of the *kudivaram* and the *melwaram* interests, or as the ownership of both warams. By a process akin to a metonymic user, the expression kudivaram interest is frequently employed to denote the species of interest which a tenant has in the land in his

1. (1881) L.R. 18 Ch. D. 698, 705.
2. (1918) 36 M.L.J. 595: L.R. 45 I.A. 209: I.L.R. 41 Mad. 1012 (P.C.).
3. (1919) 37 M.L.J. 42: L.R. 46 I.A. 123: I.L.R. 43 Mad. 166, 171 (P.C.).

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permanent occupancy, whether that land lies in an estate or outside it. This being the ordinary, popular sense, it must be taken that the word was used in this sense in the document. What is important to remember in this connection, is that *kudivaram* interest and *ryoti* tenure are not convertible terms having the same legal significance.

When we speak of ryoti land or *ryoti* tenure, the picture that is called up to our mind is the picture of that peculiar species of cultivable land in an estate, defined in the Act, to which and to the holding of which, an entire body of mostly new and special rules have been annexed by force of the statute. Among the incidents which since the Act, attach to this species of land, the most important no doubt is the permanency of the tenure and the fixity of the rent, guaranteed to the tenant under stringent safeguards, subject, however, to certain conditions to which it is unnecessary to refer for the present purpose. But the other incidents, whatever their relative importance, do exist, and should not be ignored when seeking to obtain a knowledge of the true measure and the real nature of that right. To put it in a simple form, *kudivaram* is only a part though a major part of the whole. But 15 annas do not make a rupee, nor 19 shillings a pound. To say so is not arithmetic. Neither is it in my opinion law and yet this is in substance the argument of the respondents. With all respect, therefore, I am unable to assent to the proposition that the conveyance of that species of right known as the *kudivaram* interest amounts to the creation of a *ryoti* tenure in the land conveyed.

To examine the matter still further, it is to be observed that this document came into existence more than twelve years after the passing of the Madras Estates Land Act. The expressions, ryot and ryoti land which were newly coined by the Act to replace the words 'tenant' and his 'interest' in the holding, in order probably to emphasize the permanent character of that interest, had by the time of the deed become quite familiar to all, and yet it is somewhat strange, that these words have been studiously, as I think, avoided in the conveyance. It was in fact suggested that the deed was drawn up with a knowledge of the decision reported in *Rajendramani Devi Garu* v. *Yellappa Ramu Naidu*.[1] If in these circumstances the parties had really

5. (1920) 39 M.L.J. 565.

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bargained for a conversion of the private land into ryoti land, it is not a little remarkable that language well known to denote that meaning should not have been employed instead of another, and at all events, a less decisive expression. There is, it may be observed, no suggestion of any overreaching by the one party over the other in this case.

Apart from any such narrow consideration, when one comes to look at the entire document, it becomes, in my opinion very difficult to resist the conclusion that the landholder was not here seeking to convert his private land into ryoti land. I have earlier in this judgment endeavoured to recapitulate the rules which have to be brought to bear on this question. One of those rules is that the intention of the parties is to be collected from the whole of the document, not ignoring any part. If on this principle, the conditions of the contract, contained in "the particulars of the remaining terms relating to the sale" as described in the instrument are considered, there are at least two which definitely militate against the theory of a conversion. Cls. 1 and 4 of these particulars taken together have the effect of fixing a permanent immutable rent payable year after year by the lessees, irrespective of the failure of, or a diminution in the yield, from whatever causes due. Cl. 2 again provides that arrears of rent should carry interest at the rate of ten annas per cent. instead of at the rate of eight annas fixed by S. 61. These two terms which were specifically agreed to and undoubtedly intended to be operative, annex to the tenure created by the deed incidents which are not only foreign to a ryoti tenure under the Act, but materially opposed to it. Remembering that it is open to the landholder to create any kind of derivative tenure not opposed to the general principles of law, I find it difficult, nay, impossible, to attribute to him an intention to bring into being one tenure, when the very terms of the contract clearly point to the parties having had in mind a different one, with different incidents. It is not for the Court to evaluate the terms for the purpose of accepting some and rejecting others. On the contrary, every rule of law and every rule of equity would seem to prohibit its so doing. That there is a fundamental divergence between the terms of the contract in question here and the incidents annexed to a *ryoti* tenure under the Act will, appear plainly from a perusal of S. 187. A ryot's right to sue or apply for a reduction of the rent on the

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grounds stated in cls. (*a*) and (*b*) of sub-S. (1) of S. 38 or sub-S. (3) of S. 32, or on the ground mentioned in cl. (*c*) of sub-S. (1) of S. 38 is by S. 187 (1) is preserved as an inviolable privilege not to be destroyed or overriden by any contract to the contrary whether made before or after the Act. Similar in effect is S. 187 (2) in so far as the rate of interest fixed by S. 61 is sought to be enhanced. With these inconsistent provisions contained in the deed before us I consider that it is not open to the Court to infer that it was the appellant's intention to convert his private land into ryoti land. The other clauses in the deed are indecisive, and I agree that they do not materially affect the construction. What presses on my mind is that it is not correct for a Court to infer a tenure by taking into account some only of the terms of the contract ignoring others, when it is possible, and I think it permissible to give effect to all the terms by treating it as a special contract and one not entered into for the purpose of impressing a *ryoti* tenure on the land comprised in the *khat.*

I may add a word about the decision reported in *Rajendramani Devi Garu* v. *Yellappa Ramu Naidu.*[1] That was a case where a *ryoti* tenure had been either expressly created by contract, or admitted to have been so created on the pleadings, and the question arose whether terms and conditions repugnant to such a tenure should be recognised. The Court held that the conditions were valid and enforceable. The ground of the decision is to be found in the concluding sentences in the judgment where the learned Judges say that the Legislature has not made any special provision as regards the terms on which a conversion may be made, and that in the absence of such a provision, the contract of the parties on the basis of which the conversion was made, should prevail. If the learned Judges here meant to lay it down, that there is no objection in law to the superimposition by contract of terms alien to a *ryoti* tenure, after once creating such a tenure, I must with great respect, dissent from that view, which I think is, a view which runs counter to the rule stated by Kay, J. The position here is, however, different. The question is not as to the validity of terms added which detract from the quality of a tenure created and intended to be created but whether there has been an effectual creation of the tenure itself.

1. (1920) 39 M.L.J. 565.

For the reasons explained, I regret I am unable to share the opinion of my learned colleagues. I consider that the appeal should be allowed with costs throughout.

K. C. *Appeal dimissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Appellate Jurisdiction.]

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE KRISHNASWAMI AIYANGAR.

Damaraju Venkatarayudu .. *Appellant* (1st Respondent 1st Defendant)*

v.

T. Narayanayya and others.. *Respondents (Appellant Respondents 2 to 10—Plaintiff and Defendants 2 to 10).*

Hindu Law—Widow's estate—Full surrender—Lump sum reserved for maintenance—Whether affects validity of the surrender—Property to which estate had no title, included in the properties surrendered—Suit for the property by the surrenderee—Doctrine of election whether could be applied under the circumstance.

Where a widow executed a deed of surrender of the entire estate in favour of the then nearest reversioners, but of the several properties included in the surrender it was found that the suit property should not have been included, though the purpose for its inclusion was obvious, namely, to prevent any impeachment of the surrender as being partial and hence invalid in case such property was found ultimately to have formed part of the estate, on the question whether the rightful owner of the property, one of the surrenderees, should be precluded from putting forward his independent title to the suit land on the authority of *Dalton* v. *Fitzgerald*, (1897) L.R. 2 Ch. 86,

Held, that the necessary conditions for the application of the rule of estoppel enunciated in *Dalton* v. *Fitzgerald*, (1897) 2 Ch 86 were here absent. A Hindu widow's surrender does not amount to a conveyance inspite of an arrangement for payment of a lump sum for her maintenance. The person sought to be estopped not having obtained title or derived possession under the deed to the suit property there is no scope for the application of the doctrine of estoppel or election. Even otherwise, the application of the rule of election, if permitted will create a further difficulty, because the surrendered property on election to reject the benefit cannot go back to the transferor in the case of a widow who surrenders the estate, as *ex hypothesi* she is civilly dead and if such property goes back to the heirs of her husband, all of them, including him who refused the gift would have to take the property by inheritance, election or no election. The peculiar transaction known as widow's surrender in Hindu Law does not thus admit of the application of the rule of election.

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* L.P.A. No. 58 of 1939.   21st November, 1940.

Venkatarayudu v. Narayanayya.

Appeal under cl. 15 of the Letters Patent against the judgment of the Hon'ble Mr. Justice Patanjali Sastri dated 8th August 1939 and passed in S. A. No. 672 of 1936 preferred against the decree of the Court of the Subordinate Judge, Bapatla in A. S. No. 45 of 1934. O. S. No. 98 of 1931, District Munsif's Court, Ongole.

P. Satyanarayana Rao for Appellant.

K. Kottayya for Respondent.

The Judgment of the Court was delivered by

Krishnaswami Aiyangar, J.

Krishnaswami Aiyangar, J.—One Venkatanarasimhayya died in 1887, leaving him surviving his widow Lakshmamma who succeeded to his properties for a limited estate under Hindu Law. In 1923, Lakshmamma executed a deed of surrender by which she relinquished in favour of the then nearest reversioners, the entire estate inherited by her from her husband. The reversioners were Veeraraghavayya and Narayanayya. The deed recites that she had previously received from the reversioners a sum of Rs. 200, for necessary purposes. She also received for her maintenance a further sum of Rs. 300 from one of them—Veeraraghavayya at the time of the registration of the deed. Of the several properties included in the surrender, the suit property was one, though at the time the title to it was under dispute in a suit then pending between Veeraraghavayya on the one side and the widow and Narayanayya on the other. In that suit Veeraraghavayya denied that it formed part of Venkatanarasimhayya's estate and asserted that it was really his own. Subsequent to the surrender, the two reversioners effected a partition of the properties surrendered, but the suit property was not included in the division. It was for a partition of this property said to have been left undivided that the suit out of which the present appeal has arisen, was instituted by the first respondent Narayanayya in the Court of the District Munsif of Ongole. He alleged that there was an oral arrangement between him and Veeraraghavayya for the specific allotment of particular shares in the property to each of the two sharers, though effect had not been given to it by actual mutation of possession. The contesting defendant was the appellant who is the representative in interest of Veeraraghavayya.

The District Munsif held that the oral arrangement set up by the respondent was not true, but none the less decreed parti-

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tion, on the ground that the property was the common property of the two reversioners still remaining to be divided between them. The first defendant who stood in the position of an assignee from Veeraraghavayya appealed to the Subordinate Judge of Bapatla. The learned Judge allowed the appeal and dismissed the suit. A Second Appeal was then filed in this Court by Narayanayya. Patanjali Sastri, J., who heard it, was of opinion that the decision of the Subordinate Judge was incorrect, and he accordingly allowed the appeal and restored the decree of the District Munsif. The first defendant, who was the first respondent in the second appeal has preferred this Letters Patent Appeal in pursuance of the leave granted to him by the learned Judge.

The Subordinate Judge has found that the disputed property did not form part of Venkatanarasimhayya's estate, but belonged absolutely to Veeraraghavayya in his own independent title and was and continued to be in his possession from a date anterior to the surrender. The Subordinate Judge was also of opinion that the possession of Veeraraghavayya being a possession held by him in his own right, was adverse to Lakshmamma. From these findings which are binding on us, it is clear that the suit property should not have been included in the surrender. The reason for the inclusion is, however, obvious. The parties had apparently in mind the rule of Hindu Law that for a surrender to be operative, it must be complete, that is, it must be of the whole estate. They were afraid of leaving out the suit property which was under litigation at the time. For if it should ultimately turn out that it did in fact form part of the estate, the surrender would be open to the attack that it was partial and, therefore, invalid. The judgment of Patanjali Sastri, J., is entirely based on the view that the rule of estoppel enunciated by the Court of Appeal in *Dalton* v. *Fitzgerald*,[1] is applicable to the facts of this case, with the result that he held that the appellant is precluded from putting forward Veeraraghavayya's independent title to the property. The rule is stated in the following words by Lopes, L. J.:

"A person having no title to land settles it on *A* for life with remainder to *B*. *A* enters and takes possession and deals with the property as tenant for life; that person is estopped from telling the truth,—his mouth is shut; he has availed himself of the settlement for the purpose of obtaining possession of the land, and he cannot afterwards seek to invalidate that which

1. (1897) L.R. 2 Ch. 86.

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enabled him to obtain possession, and this though subsequently he may have acquired a good title. If a man obtains possession of land claiming under a deed or will, he cannot afterwards set up another title to the land against the will or deed though it did not operate to pass the land in question and if he remains in possession till twelve years have elapsed and the title of the testator's heir is extinguished, he cannot claim by possession an interest in the property different from that which he would have taken if the property had passed by the will or deed."

From this statement of the law, it is plain that it is an essential condition for the application of the doctrine, that the person sought to be estopped or his predecessor-in-interest must have obtained possession of the property, under the deed. It is also plain that both in *Dalton* v. *Fitzgerald*,[1] and in *Board* v. *Board*,[2] which was cited in it with approval, the party estopped did not have and did not profess to have any title to the property other than the title he derived from the deed. But the facts of the case before us are wholly different. Veeraraghavayya did not obtain his title under the deed of surrender. Neither did he derive his possession from it. Therefore, we consider that the necessary conditions for the application of the rule of estoppel enunciated in *Dalton* v. *Fitzgerald*,[1] are here absent. As we understand his judgment, Patanjali Sastri, J., appears to consider that because Veeraraghavayya had approbated the transaction by receiving a substantial benefit under the deed, in the shape of a share in the admitted properties of the estate, he should not be permitted to reprobate it in so far as it purported to convey the suit property even though that property was really his own. But this is a principle different from that which formed the basis of the decision in *Dalton* v. *Fitzgerald*[1] in which the estoppel was held to arise in respect of the very property received under the grant, and not belonging to the claimant otherwise. The learned Judge here appears to have in mind the doctrine of election which is a different aspect of estoppel, though it is also founded on the same rule, namely the rule against permitting a party to approbate and reprobate the same transaction.

The rule of election is embodied in S. 35 of the Transfer of Property Act in regard to deeds, and in Ss. 180 to 190 of the Indian Succession Act in regard to wills. To invoke this doctrine we must have a will or a deed which conveys title to a person in properties other than those belonging to himself,

1. (1897) L.R. 2 Ch. 86. 2. (1873) L.R. 9 Q.B. 48.

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before he can be put to election. Here arises a common question as important for the application of the rule in *Dalton* v. *Fitzgerald*[1] as it is for the application of the principle of election. Does a surrender by a Hindu widow to her immediate reversioners amount to a *conveyance*, and to a conveyance by *her* of *her* property to the surrenderees? We are clearly of opinion that it does not. It is settled that the true view of surrender under the Hindu Law is that it is a voluntary act of self-effacement by the widow, having the same consequence as her death, in opening up the succession to the next heirs of the last male owner. The intermediate estate is merely extinguished and not transferred and the law then steps in to accelerate the succession so as to let in the next reversioners. The surrender conveys nothing in law; it is purely a self-effacement, which must of necessity be complete; for as the Privy Council has said, there cannot be a widow partly effaced, and partly not, just as there cannot be a widow partly dead, and partly alive. The fiction of a civil death is thus assumed when a surrender takes place; and when the reversioners come in, they come in, in their own right, as heirs of the last owner, and not as transferees from the widow. The principle is not displaced by a reasonable provision being made out of the estate for the maintenance of the widow, as it is settled, that a reservation of this character does not detract from the validity of the surrender. We can see no objection to such a provision taking the form of a lump payment by the reversioners, or being fixed, if fixed *bona fide*, by bargain between the surrendering widow and her reversioners. Indeed it is difficult to imagine how else there could be a satisfactory arrangement for the quantum of the maintenance being duly fixed. What is important, however, to remember is that a subsidiary arrangement of the kind confined only to maintenance cannot affect the legal character of the main transaction, which still remains a surrender; it extinguishes the widow's title, and does not convey it.

From what has been said it is clear that there is no scope here for the application of the doctrine of estoppel or election. We must not in this connection omit to notice another difficulty in applying the rule against approbating or reprobating, to a transaction by way of surrender. Now it is open to a legatee or donee under an instrument, to elect to retain his own pro-

1. (1897) 2 Ch.D. 86.

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perty to himself and refuse to take a benefit in other properties of the giver at the expense of what is his own. If he so elects, to whom does the property given go? In an ordinary case, it reverts back to the transferor or if he is dead, to his representatives. But in the case of a surrender under Hindu Law, it cannot go back to the widow, as *ex hypothesi* she is already civilly dead; and if it goes back to the heirs of her husband, all of them including him who refused the gift would take the property by inheritance, election or no election. It would thus appear that the peculiar transaction known as a surrender in Hindu Law does not admit of the application of the rule of election.

For the reasons explained, we are unable to concur in the conclusion reached by Patanjali Sastri, J., that the appellant is estopped from relying on Veeraraghavayya's title. The result is that the appeal succeeds and is accordingly allowed with costs here and in the second appeal.

K. C. —— *Appeal allowed*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATARAMANA RAO AND MR. JUSTICE HORWILL.

Chapalamadugu Govindayya (deceased) and another *Appellants** *(1st Plaintiff and his L. R.)*

v.

Suddapalli Ramamurthi and others. *Respondents (Defendants 1 to 10).*

Govindayya v. Ramamurthi.

Civil Procedure Code (V of 1908), O. 32, r. 15—Person of unsound mind—Representation by next friend—Enquiry before plaint being admitted—Enquiry whether could be made after permission for plaint being filed.

In cases coming under O. 32, r. 15, Civil Procedure Code, it is desirable that the Court should before admitting the plaint insist upon an independent application and an affidavit disclosing the facts relating to the unsoundness of mind of the person on whose behalf the plaint is presented; it is also open to the Court to direct the next friend to produce witnesses before it in order that it may satisfy itself as to the mental capacity of the person on whose behalf the plaint is presented. All that is needed is that there should be some *prima facie* proof to satisfy the Court that the person was by reason of unsoundness of mind or mental infirmity incapable of protecting his interests, because an order permitting the next friend to represent such a person is not final. It is always open to the defendant to take out an independent application to have the said order revoked when the Court can go fully into the matter. But when once the Court permits the next friend to sue on behalf of such person, it is not open to the Court to raise an independent issue in the trial

* Appeals Nos. 195 and 293 of 1937. 28th October, 1940.

as to the competency of the next friend to represent him in the suit (vide *Richmond* v. *Branson & Son*, (1914) 1 Ch.D. 968, followed in City Civil Court Appeal No. 36 of 1936). Govindayya v. Ramamurthi.

Nirendra Lal Bhattacharya v. *Bepin Chandra Bhattacharya*, (1934) 38 C. W.N. 1081 and *Rajammal* v. *Mahadeva Aiyar*, 1937 M.W.N. 398, explained.

Appeals against the decree of the Court of the Subordinate Judge of Bapatla in O. S. No. 39 of 1931.

M. S. Ramachandra Rao and *D. R. Krishna Rao* for Appellant in Appeal No. 195 of 1937 and *K. Rajah Iyer* and *K. Kottayya* for Appellants in Appeal No. 293 of 1937.

R. Hariprasada Rao and *B. S. Ramachandra Rao* for Respondents in Appeal No. 195 of 1937 and *B. S. Ramachandra Rao, A. Bhujanga Rao* and *D. R. Krishna Rao* for Respondents in Appeal No. 293 of 1937.

The Court delivered the following

JUDGMENT:—*Venkataramana Rao, J.*—These two appeals arise out of a suit to enforce a mortgage dated 16th January, 1919 executed in favour of Chappalamadugu Govindayya by one Yagnayya and his undivided son Ramamurti, and Hanumantha Rao for himself and as guardian of his sons Venkatanarasimham and Satyanarayana who are defendants 2 and 3 in this suit. All the members of the family of Hanumantha Rao are also impleaded as defendants herein besides Ramamurti, the son of Yagnayya. The said Ramamurti, Venkatanarasimham and Satyanarayana are impleaded as trustees of Seetaramaswami and Anjaneya temples on the ground that the father of the 1st defendant Yagnayya, and Hanumantha Rao the father of Venkatanarasimham and Satyanarayana were trustees of the said temples. The reason for the inclusion of these defendants in the capacity of trustees apart from their individual capacity is that items 19 and 20 of the plaint schedule property which are also comprised in the said deed of mortgage are properties dedicated to the said temples and vested in the trustees in trust for the temples. The validity and the binding nature of this mortgage on the minor defendants was the subject-matter of an issue in the partition suit (O. S. No. 63 of 1932) on the file of the Sub-Court, Bapatla, out of which Appeal No. 293 of 1937 arises. The evidence relating thereto has been elaborately discussed by the learned Subordinate Judge who came to the conclusion that the said mortgage was binding on all the members of the family including the minor plaintiffs in O. S. No. 63 of 1932. In that suit the properties mortgaged were described as items 1 to 26 of the B schedule to the plaint. In those properties the family

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of Hanumantha Rao was entitled to two-thirds and the other one-third belonged to Yagnayya. The case for Hanumantha Rao in the partition suit was that the said properties were his self-acquisitions whereas the case of the other members of the family was that they were purchased for the benefit of the family. Those properties originally belonged to one Venkatappayya who died leaving him surviving his widow Seetamma and his mother. On the death of his widow and mother, the succession opened and the reversioners who were entitled to the said properties were Yagnayya the father of Ramamurti and one Venkataramayya and another Sriramamurti each entitled to one third share. It appears that Venkataramayya became entitled to two-thirds subsequently. On 26th June, 1915, Hanumantha Rao purchased the two-third share of Venkataramayya under Ex. H. In regard to these properties the reversionary rights of Yagnayya and Venkataramayya were questioned by certain persons who filed O.S. No. 72 of 1910 on the file of the Sub-Court, Bapatla, which ended ultimately in favour of the said Yagnayya and Venkataramayya. Another suit was filed for recovery of these properties (O. S. No. 6 of 1919) and expenses had to be incurred in connection therewith. The suit mortgage was executed partly for the purpose of meeting those expenses, the debts incurred in connection therewith and also for discharging a debt incurred for averting a Court sale of items 19 and 20 in execution of the decree in O.S. No. 585 of 1910 obtained on a deed of mortgage executed by the original owner of the property. In both the suits (O. S. 63 of 1932 and in the present suit) the validity of the mortgage was dealt with on the footing that the said two-thirds acquired under Ex. H was joint family property and the case set up by Hanumantha Rao was negatived. The question whether the mortgage deed was true and supported by consideration and binding on the members of the family was also raised in this suit. The learned Judge adopted the finding arrived at in O.S. No. 63 of 1932 in this suit also. He however, came to the conclusion that the mortgage was not enforceable against items 19 and 20 on the ground that they were trust property and that there was no satisfactory evidence to show that they were comprised in the mortgage decree in pursuance of which the properties were alleged to have been brought to sale. Appeal No. 195 of 1937 was filed by the first plaintiff in so far as the

decree was against him in relation to items 19 and 20. Appeal No. 293 of 1937 was filed by the plaintiffs in O. S. No. 63 of 1932 who are also defendants 3, 5 and 6 in the suit out of which this appeal arises.

Mr. Rajah Aiyar has raised two contentions in these appeals (1) that the suit itself is incompetent and ought to have been dismissed, and (2) that the mortgage was not supported by consideration in respect of two items which formed part of the consideration, namely, (1) a sum of Rs. 4713-14-4 being the amount borrowed for the purpose of discharging a promissory note dated 14th January, 1919, in favour of the plaintiff and (2) a sum of Rs. 1140-6-11 being cash alleged to have been paid on the date of the mortgage.

Mr. M. S. Ramachandra Rao, who appears for the plaintiff, raised a preliminary objection that the appeal itself is incompetent. We shall briefly dispose of the preliminary objection. The contention of Mr. Ramachandra Rao is that the finding as regards consideration was incorporated in the decree in O. S. No. 63 of 1932 and no appeal was preferred in regard thereto and the adjudication therein has become final and will operate as *res judicata*. But we think this contention is unsustainable in view of the Full Bench decision in *Panchanada Velan* v. *Vaidianatha Sastrial*[1] and *Ramaswami Chetti* v. *Karuppan Chetty*[2].

We shall now deal with Mr. Rajah Aiyar's contention as to the competency of the suit. The plaint was filed on behalf of Govindayya as first plaintiff represented by his brother's son Rangayya and also by Rangayya as second plaintiff. Govindayya is described in the cause title thus: "Chapalamadugu Govindayya being lunatic by next friend Chapalamadugu Rangayya." The plaint was filed on 15th January, 1931. Three years afterwards on the 20th March, 1934, the first plaintiff, filed an application stating that he was of sound mind that the second plaintiff had no right to the suit amount and that he should be removed from the suit and also as his next friend and he should be permitted to conduct the suit himself. The second plaintiff had no objection and the order was made in terms of the petition. Later on, after all the witnesses were examined the second plaintiff filed an application stating, that he might be appointed

1. (1905) 16 M.L.J. 63: I.L.R. 29 Mad. 333 (F.B.).
2. (1915) 29 M.L.J. 551.

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as the next friend of the first plaintiff; but that application was dismissed on the ground that Govindayya was not so mentally infirm as to be incapable of protecting his interests. One of the issues in the suit was whether the first plaintiff was a lunatic and the second plaintiff had a right to represent the first plaintiff. On that issue the learned Judge recorded his finding thus:

"I find on issue 9 that the first plaintiff was of unsound mind and incapable of protecting his interests when the suit was filed and the second plaintiff was consequently entitled to file the suit as his next friend".

Mr. Rajah Aiyar challenges this finding and says that the suit must be held to be incompetent on the ground that when it was filed the first plaintiff must be deemed to have been of sound mind and the plaint must be held to have been validly presented only on the date when it was amended by striking out the name of the next friend and this suit having been filed more than twelve years of the execution of the bond is barred by limitation. He further contends that even assuming the first plaintiff was of unsound mind the plaint was not filed in accordance with O. 32, r. 15 as no enquiry was held and no order passed permitting the second plaintiff to sue as the next friend of the first plaintiff. He relied in support thereof on a decision of the Calcutta High Court in *Nirendra Lal Bhattacharya* v. *Bepin Chandra Bhattacharya*[1] and a decision of our learned brother Mockett, J., in *Rajammal* v. *Mahadeva Aiyar*[2]. Before dealing with this contention the question we have to find is whether the first plaintiff was really of unsound mind on 16th January, 1931, the date when the plaint was filed. The learned Judge on a consideration of the evidence came to the conclusion that he was. It is in evidence that he was really of unsound mind from 1923 to 1933 for a period of ten years and was also kept in the Mental Hospital, Waltair, that up to 1933, in litigations had with reference to his estate, the second plaintiff was acting as his next friend and guardian. There was also oral evidence to the effect that the first plaintiff was really of unsound mind in the beginning of 1931 when the present suit was filed. Nothing has been shown to us that the finding of the learned Judge that the plaintiff was really of unsound mind on the date of the plaint is wrong. We therefore, affirm the said finding.

1. (1934) 38 C.W.N. 1081. 2. 1937 M.W.N. 398.

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In view of this finding the question is whether there has been a valid presentation of the plaint on 16th January, 1931. O. 32, r. 15 runs thus:

> "The provisions contained in rr. 1 to 14, so far as they are applicable, shall extend to persons adjudged to be of unsound mind and to persons who though not so adjudged are found by the Court on enquiry, by reason of unsoundness of mind or mental infirmity, to be incapable of protecting their interests when suing or being sued".

According to the above rule the provisions relating to minors should be applied as far as they are applicable. In the case of a person who is not adjudged to be of unsound mind but who by reason of unsoundness of mind or mental infirmity is incapable of protecting his rights the plaint should be filed on his behalf by a next friend. That has been done in this case. But what is urged is that before a next friend can represent such a person it must be found on enquiry by the Court that the person by reason of unsoundness of mind or mental infirmity is incapable of protecting his interests. That is, there must be a preliminary enquiry and a finding of the Court before the plaint was filed. That is the view taken by our learned brother Mockett, J. It seems to us that such a procedure is not contemplated by the provisions of the Code. Apparently our learned brother was having in view the procedure similar to that adopted in pauper suits or the English practice. There is no provision in the Civil Procedure Code under which such an enquiry can be had. What is contemplated is that the plaint must be filed by a next friend and the Court, before admitting the plaint, should satisfy itself on enquiry that the person on whose behalf the plaint is presented was by reason of unsoundness of mind incapable of protecting his interests and should be represented by a next friend. Ordinarily the next friend ought to file an application supported by an affidavit along with the plaint and the judge should pass an order thereon. That the section does contemplate an enquiry there can be no doubt, but the nature of the enquiry is not indicated. It seems to us that if the affidavit in support of the request to permit a person to sue as a next friend discloses all the facts which would satisfy the Court that the person on whose behalf the plaint is presented is by reason of unsound mind or mental infirmity incapable of protecting his interests, without any further enquiry the Court can permit the next friend to sue on his behalf, or if the allegations in the affidavit are not convincing, it is open

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to the Court to direct the next friend to produce witnesses before it in order that it may satisfy itself as to the mental capacity of the person on whose behalf the plaint is presented. All that is needed is that there should be some *prima facie* proof such as to satify the Court that the person was by reason of unsoundness of mind or mental infirmity incapable of protecting his interests, because an order permitting the next friend to represent such a person is not final. It is always open to the defendant to take out an independent application to have the said order revoked when the Court can go fully into the matter. But when once the Court permits the next friend to sue on behalf of such a person, it is not open to the Court to raise an independent issue in the trial as to the competency of the next friend to represent him in the suit (vide *Richmond* v. *Branson & Son*[1] followed in City Civil Court Appeal No. 36 of 1936). In this case as soon as the plaint was presented the Court finding that it was presented on behalf of a person of unsound mind, called for an affidavit and the said affidavit was filed and it was after that, the plaint was permitted to be filed by the next friend. We must, therefore, take it that the learned Judge who admitted the plaint, on a perusal of the affidavit, satisfied himself that the 1st plaintiff was a person of unsound mind incapable of protecting his own interest. In view of the fact that the first plaintiff was up to the date of the plaint treated as a person of unsound mind and having regard to his previous history, the Court was probably justified on the allegations in the affidavit in coming to the conclusion which it did namely, permitting the second plaintiff to sue as the next friend. We think it desirable that the Court should insist upon an independent application and an affidavit fully disclosing the facts relating to the unsoundness of mind of the person on whose behalf the plaint is presented and the Court before admitting the plaint should, if the allegations in the affidavit are not convincing, insist upon the production of witnesses in order to enable the Court to satisfy itself that the person was of unsound mind and incapable of protecting his own interests and record a finding to that effect. In this case the first plaintiff having been permitted to sue by a next friend it was not open to the Court to raise issue No. 9. We therefore, find that the suit by the next friend was competent.

1. (1914) 1 Ch. 968.

We shall now deal with the contention of Mr. Rajah Aiyar relating to the two items of consideration referred to by him as valid and binding on the minor plaintiffs. There is absolutely no evidence to show that the mortgage to discharge which the sum of Rs. 4,713-14-4 was borrowed was binding on the properties which were purchased under Ex. H and Mr. Ramachandra Rao frankly concedes that the evidence is not such as to warrant a finding in favour of his client. We must therefore declare the said items of consideration as not binding on the appellants (defendants 3, 5 and 6) who were also plaintiffs 1 to 3 in O. S. No. 63 of 1932. But what Mr. Ramachandra Rao contends is that items 19 and 20 in any event must be declared liable which is the subject-matter of Appeal No. 293 of 1937. It seems to us that this contention is well founded. Items 19 and 20 were dedicated to the temples of Seetharamaswami and Anjaneyaswami by the original owner Venkataramayya subsequent to the date of the execution of the mortgage on which the decree in O.S.No. 585 of 1910 was obtained. There is evidence in this case that items 19 and 20 were the subject of the said mortgage. There is an admission by Yagnayya and Hanumantha Rao that the said items did form part of the said mortgage. In the written statement filed in O. S. No. 93 of 1922, a suit relating to the trust, paragraph 10 of the written statement is to the following effect:

"Late Venkatappayya mortgaged items 1 and 2 of the plaint A schedule under two mortgage deeds of the 10th March, 1883 and 11th January, 1889. The mortgagees obtained decrees in O. S. Nos. 585 and 589 of 1910 on the foot of these mortgages."

No doubt in that suit a compromise was arrived at by which Ramamurthi, Venkataramayya and Hanumantha Rao for himself and as guardian of his sons Venkatanarasimham and Satyanarayana agreed to get released the said items 19 and 20 from the suit mortgage. Therefore the evidence so far as is available in this suit goes to show that items 19 and 20 were in any event liable for the mortgage executed by the original owner Venkatappayya and the said amount of Rs. 4,713-14-4 was borrowed to discharge the mortgage decree to avert the Court sale of the said items. *Prima facie* therefore the said items 19 and 20 are liable to bear the burden of the said debt. We are therefore inclined to hold that so far as the said sum of Rs. 4,713-14-4 is concerned, it must be declared to be binding on items 19 and 20 and not upon the rest of the properties and

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we construe the deed of mortgage as having been executed by the members of the family of the appellant and Yagnayya in their individual right in regard to the amount borrowed for the purpose of the reversionary litigation and by Yagnayya and Hanumantha Rao in their capacity as trustees so far as Rs. 4,713-14-4 in concerned. The decree must therefore be modified by declaring that only items 19 and 20 can be brought to sale in respect of the sum of Rs. 4,713-14-4 with interest thereon and for the rest of the consideration the other items are to be brought to sale.

In regard to the sum of Rs. 1,140-6-11 paid as cash, we must hold the said item of consideration as binding on the plaintiffs. The said sum was admittedly borrowed for the purpose of the reversionary litigation as a result of which the properties mortgaged were obtained for the benefit of the family. Time for redemption, six months.

The appellants in both the appeals will pay and receive proportionate costs.

The appellant in Appeal No. 293 of 1937 is hereby directed to pay the Court-fee payable on the memorandum of appeal to Government, and he will get proportionate costs in the appeal which will be recovered by him from the respondents.

K. C. —— *Decree modified.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE LAKSHMANA RAO.

Kodiyala Chandriah and others .. *Petitioners* (Accused).*

Chandriah, *In re.*

Indian Penal Code (XLV of 1860), S. 341—Offence under—Whether included in offence of unlawful assembly—Separate sentence of fine—Propriety.

The offence under S. 341, Indian Penal Code, is involved in the offence of unlawful assembly and a separate sentence of fine under S. 341 is not proper.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying that the High Court will be pleased to revise the judgment of the Court of the Taluk First Class Magistrate, Nandigama, in C. C. No. 342 of 1938.

K. S. Jayarama Aiyar and *P. Sivaramakrishnayya* for Petitioners.

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* Crl. R. C. No. 123 of 1940
(Crl. R. P. No. 117 of 1940). 8th February, 1940.

Chandriah, *In re.*

The Court made the following

ORDER.—The offence under S. 341, Indian Penal Code, is involved in the offence of unlawful assembly and the separate sentence of fine under S. 341, Indian Penal Code, is not called for. The sentence of fine under S. 341, Indian Penal Code, is therefore set aside and otherwise this petition is dismissed.

B. V. V. *Sentence modified.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

Papellugari Veera Reddi and others .. *Petitioners* (Accused 1, 2 and 4 to 7).*

Veera Reddi, *In re.*

Criminal Procedure Code (V of 1898), Ss. 195 and 476—Scope.

Where one of the offences alleged was an offence under S. 193, Indian Penal Code, in connection with a proceeding before a District Munsif such an offence falls under Ss. 195 (1) (*b*), Criminal Procedure Code, for which a complaint under S. 476, Criminal Procedure Code, is necessary. The fact that the District Munsif had also complained that the facts established offences under other sections of the Indian Penal Code, to which S. 476 had no application is not a ground for cancelling the complaint which was valid and necessary so far as the offences under S. 193, Indian Penal Code, was concerned.

Petition under S. 115 of Act V of 108 praying that the High Court will be pleased to revise the order of the District Court of Cuddapah dated the 6th November, 1940 and made in C. M. As. Nos. 23, 28 and 29 of 1940 against the proceedings under S. 476 of the Code of Criminal Procedure dated the 22nd July, 1940, of the Court of the District Munsif of Cuddapah in O. S. No. 175 of 1938.

A. Narasimha Aiyar for Petitioners.

The Public Prosecutor for the Crown.

The Court delivered the following

JUDGMENT.—The basis of this revision petition is the assertion that the petitioners are not parties to any suit and that they cannot therefore be prosecuted by means of a complaint under S. 476, Criminal Procedure Code. The petitioners rely on the Full Bench ruling in *Govinda Aiyar* v. *Rex*[1], which has a rather misleading headnote. The decision really related to a case falling under S. 195 (1) (*c*), Criminal Procedure Code and had nothing to do with cases falling under S. 195 (1) (*b*) in which the accused need not be a party. Here one of the

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* C. R. P. No. 1939 of 1940. 18th December, 1940.

1. (1918) 36 M.L.J. 448: I.L.R. 42 Mad. 540 (F.B.).

Veera Reddi, *In re.*

offences alleged is an offence under S. 193, Indian Penal Code, in connection with a proceeding before the District Munsif. Such an offence clearly falls under S. 195 (1) (*b*), Criminal Procedure Code and a complaint under S. 476 of the Criminal Procedure Code was necessary. The fact that the District Munsif has also complained that the facts establish offences under other sections to which S. 476, Criminal Procedure Code, has no application, is not a ground for cancelling the complaint which was valid and necessary so far as the offence under S. 193, Indian Penal Code, was concerned. Certainly it would have been better had the District Munsif filed a separate complaint, in his executive capacity of the offences of theft, etc., instead of including them in his complaint under S. 476, Criminal Procedure Code. But the accused have not been damnified, more especially as there is a police charge sheet in respect of those offences upon which the prosecution can be based. I decline to interfere in revision and dismiss this petition with costs of the Public Prosecutor.

K. S. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE LAKSHMANA RAO.

Marana Goundan .. *Appellant* (Prisoner-Accused).*

Marana Goundan, *In re.*

Penal Code (XLV of 1860), Ss. 304 (2) and 323—Offence under—Death by shock due to kicking on abdomen—Absence of mark of injury.

The deceased owed one anna to the appellant and the latter demanded repayment. The deceased promised to pay later and the appellant thereupon kicked him twice on the abdomen remarking "How long am I to wait". The deceased collapsed and died soon after, the cause of death being shock due to the kicking, there however being no mark of injury external or internal.

Held, that it could not be said under the circumstances that the appellant intended or knew that by kicking on the abdomen he was likely to endanger life, and that the accused was liable to be convicted under S. 323 and not S. 304 (2), Indian Penal Code.

Appeal against the order of the Additional Sessions Judge, Court of Session of the Coimbatore Division in C. C. No. 100 of 1940.

Appellant not represented.

K. Venkataraghavachari for Public Prosecutor for the Crown.

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* Crl. Appeal No. 654 of 1940. 17th December, 1940.

The Court delivered the following

Marana Goundan, *In re.*

JUDGMENT.—The appellant has been convicted under S. 304 (2) of the Indian Penal Code for causing the death of one Karuppa Chuckli by kicking him on the abdomen and sentenced to rigorous imprisonment for 7 years.

The deceased owed one anna to the appellant and the latter demanded repayment. The deceased promised to pay later and the appellant, is stated to have kicked him twice on the abdomen remarking 'How long am I to wait'. The deceased collapsed and died soon after.

The cause of death was shock due to the kicking and P. W. 7 a disinterested witness not to mention P. W. 4 the widow speak to the alleged kicking. P. W. 5 was informed about it soon after, and the story of the appellant that he merely pushed the deceased and went away is incredible. But there was no mark of injury external or internal, and it is difficult to hold that the appellant intended or knew that by kicking on the abdomen as he did he was likely to endanger life. The conviction under S. 304 (2), Indian Penal Code, is therefore unsustainable and as rightly conceded the conviction can only be under S. 323, Indian Penal Code. The conviction of the appellant is therefore altered to one under S. 323, Indian Penal Code and he is sentenced to rigorous imprisonment for one year.

B. V. V. *Conviction modified.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE BURN AND MR. JUSTICE MOCKETT.

K. Nagalinga Chetty .. *Appellant* (Petitioner-Defendant)*

v.

O. K. Srinivasa Aiyangar and another. *Respondents (Respondents-Plaintiffs).*

Nagalinga Chetty *v.* Srinivasa Aiyangar.

Civil Procedure Code (V of 1908), S. 48—Decree passed by Small Cause Court—Unsuccessful new trial application and Civil Revision Petition—Limitation for executing decree—Starting point.

The decree in a small cause suit was passed by the Small Cause Court, Madras, on 2nd February, 1926. The decree-holder unsuccessfully prosecuted a new trial application against the judgment and thereafter a Civil Revision Petition to the High Court. He filed a petition to execute the decree of the Small Cause Court in October, 1938.

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* A. A. O. No. 284 of 1939. 10th December, 1940.

Nagalinga Chetty v. Srinivasa Aiyangar.

Held, that execution of the decree was barred by limitation under S. 48, Civil Procedure Code and the fact that the revision petition was filed and was dismissed was not material for deciding the question of limitation.

Ramachandra Rao v. *Parasuramayya*, (1940) 1 M.L.J. 235: I.L.R. (1940) Mad. 349 (F.B.), applied.

Chidambara Nadar v. *Rama Nadar*, (1937) 1 M.L.J. 453: I.L.R. (1937) Mad. 616, considered.

Appeal against the order of the City Civil Court, Madras, dated the 20th April, 1939 and made in C. M. P. No. 371 of 1939 in E. P. No. 759 of 1938 (M. S. C. No. 7395 of 1925 on the file of the Court of Small Causes, Madras).

V. Ramaswami Aiyar for Appellant.

T. K. Rangaswami for Respondents.

The Court delivered the following

Burn, J.

JUDGMENTS. *Burn, J.*:—This is an appeal from an order of the learned Principal Judge of the City Civil Court in E. P. No. 759 of 1938 in M. S. C. No. 7395 of 1925. The question is whether the execution is barred by S. 48 of the Code of Civil Procedure.

The decree in the small cause suit was passed on the 2nd February, 1926. The execution petition was filed on 27th October, 1938. It was a fresh application for execution. *Prima facie* S. 48 prevents the Court from passing any orders for execution on such application. The decree-holder's plea was that he was entitled to execute because subsequent to the decree passed by the Court of Small Causes he had filed a new trial application in 1926 and that when that failed he had filed a revision petition in the High Court (C.R.P. No. 127 of 1927). That revision petition was dismissed with costs on 7th March, 1928 and the decree-holder contended that the period of twelve years indicated in S. 48 should be calculated from 7th March, 1928. In that case the application would of course be well within twelve years. The learned Principal Judge of the City Civil Court had decided in favour of the decree-holder. Considering what he calls an analogous provision in Art. 182 of the Limitation Act he has found that for the purpose of that article the date of the decision of a revision petition against a decree of a Small Cause Court is to be taken into account and not the date of the decree of the Small Cause Court. He has referred to the decision of the Privy Council in *Nagendra De* v. *Sureschandra De*[1]. In that case their Lordships pointed out

1. (1932) 63 M.L.J. 329: L.R. 59 I.A. 283: I.L.R. 60 Cal. 1 (P.C.).

that there was no definition of the word 'appeal' in the Code of Civil Procedure and that for the purpose of Art. 182 any application by a party to an appellate Court asking it to set aside or revise the decision of a Subordinate Court would be an appeal within the ordinary meaning of the word. The learned Judge of the Court below, therefore, considered that the "reasons for which an appeal was held to include a revision petition in connection with Art. 182 would apply with equal force to enable a revision petition to give a fresh starting point under S. 48, Civil Procedure Code." But curiously enough after coming to this conclusion the learned Judge goes on to say:

"So that in computing the period of twelve years, the time taken in the revision petition will have to be deducted."

This looks as though he were applying the principle of S. 15 of the Limitation Act. But that was not a contention that was ever raised before him nor was it a contention which he appeared to be considering. The only point in dispute before him was whether the period of twelve years ought to begin on the 2nd February, 1926 or on the 7th March, 1928. The time taken for the prosecution of the civil revision petition was quite irrelevant to this question.

Learned counsel for the appellant (judgment-debtor) has pointed out that the terms of S. 48 are very different from the terms of Art. 182 and that Art. 182 of the Limitation Act only applies to cases which do not fall within S. 48. Where an application has been made to the High Court for revision of a decree of a Small Cause Court the period of three years prescribed in Art. 182 of the Limitation Act begins to run from the date of the High Court's order on the revision petition, whether the decree of the Small Cause Court is confirmed, modified or reversed (vide *Chidambara Nadar* v. *Rama Nadar*[1]). That decision, however, does not deal with S. 48 of the Code of Civil Procedure. Now S. 48 says that:

"Where an application to execute a decree not being a decree granting an injuncton has been made, no order for the execution of the same decree shall be made upon any fresh application presented after the expiration of twelve years from the date of the decree sought to be executed."

Mr. Ramaswami Aiyar's contention for the appellant is that the decree which the decree-holder is here seeking to execute is the decree of the Small Cause Court, the date of the decree

1 (1937) 1 M.L.J. 453: I.L.R. (1937) Mad. 616.

Nagalinga Chetty v. Srinivasa Aiyangar.
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urn, J.

is 2nd February, 1926 and the fact that a revision petition was presented in the High Court which was dismissed does not alter the date of the decree of the Small Cause Court. It has recently been held by a Full Bench of this Court (vide *Ramachandra Rao* v. *Parasuramayya*[1]), that if a decree is amended under S. 152 of the Code of Civil Procedure in order to bring it into accordance with the judgment, the period of twelve years under S. 48 of the Code of Civil Procedure still runs from the date of the decree and not from the date of the amendment. Stress is laid upon the wording of S. 48 and it is emphasised that the date to be taken into account is the date of the decree which is being executed. This contention we think must be accepted. There is no analogy between Art. 182 of the Limitation Act and S. 48 of the Code of Civil Procedure, because Art. 182 expressly states that all applications that fall under S. 48 of the Code of Civil Procedure are excluded from its operation. The decision of the Principal Judge of the City Civil Court cannot therefore be upheld. In so far as the execution of the Small Cause Court's decree is concerned, this application E. P. No. 759 of 1938 was barred by S. 48 of the Code of Civil Procedure.

It has not, however, been apparently noticed until now that the decree-holder was claiming not only the amount of the decree of the Small Cause Court with interest and costs but also the amount of costs awarded to him by this Court in C. R. P. No. 127 of 1927 with interest on that amount. The decree of the High Court awarding him costs having been passed on the 7th March, 1928, the application presented on the 27th October, 1938, is in time so far as that amount is concerned. The execution petition will therefore be returned to the City Civil Court to be dealt with in accordance with law in the light of this judgment. The appellant will recover his costs of this appeal from the respondents.

Mockett, J.

Mockett, J.—I agree. It seems to me that finality is given to the argument which the respondents have put forward in this case by the decision of a Full Bench of this Court in *Ramachandra Rao* v. *Parasuramayya*[1]. The learned Chief Justice in giving the judgment of the Court states quite clearly that Art. 182 of the Limitation Act leaves the provision in S. 48 of

1. (1940) 1 M.L.J. 235: I.L.R. (1940) Mad. 349 (F.B.).

the Code of Civil Procedure untouched and that there can be no execution of a decree governed by S. 48 when twelve years have passed from the date of the decree, amendment or no amendment. In that case the Court was concerned with an amendment of a decree and it was pointed out by Krishnaswami Aiyangar, J., that the effect of the law as laid down by the Full Bench might in exceptional cases render the amendment of a decree futile and barren. But as the learned Judge points out, that is an anomaly and any remedy for it was in the hands of the legislature. I think that applies to this case. It may well be that owing to the delay in the hearing of civil revision petitions very many valuable years may be lost to a decree-holder in which he might execute his decree but it seems to me that it would be straining the very clear wording of S. 48 of the Code of Civil Procedure and to hold contrary to the express decision of the Full Bench to which I have referred if we uphold the view which has been taken by the City Civil Judge. In this case it is interesting to note that the decision of the Full Bench in *Chidambara Nadar* v. *Rama Nadar*[1], which held that Art. 182 (2) of the Limitation Act applied to civil revision petitions as well as to orders in appeal was not even referred to by any of the learned counsel who argued the case in *Ramachandra Rao* v. *Parasuramayya*[2]. I agree with the order proposed by my learned brother.

B.V.V. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Appellate Jurisdiction.]

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE HAPPELL.

P. P. Ramabhadran, Liquidator .. *Appellant* (Petitioner)*

v.

T. S. Manickkam and others ..... *Respondents (Respondents 1, 3 to 7 and 9 to 19).*

Ramabhadran v. Manickkam.

Companies Act (VII of 1913), Ss. 156, 212 and 216—Voluntary liquidation—Failure of shareholders to pay for shares allotted to them as signatories of memorandum of association or on application—Liquidator's right to place them in list of contributories, make calls and enforce them.

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1. (1937) 1 M.L.J. 453: I.L.R. 1937 Mad. 616 (F.B.).
2. (1940) 1 M.L.J. 235: I.L.R. 1940 Mad. 349 (F.B.).

* O. S. A. No. 39 of 1940. 19th December, 1940.

Rama-bhadran v. Manickkam.

Where a shareholder has failed to pay for shares alloted to him as a signatory to the memorandum of association or on application, he can in the event of the company going into liquidation, be placed upon the list of contributories and the liquidator can make a call upon him for what is due, in which case the Court can enforce the call without requiring the liquidator to institute a suit and the amount of the call becomes payable irrespective of any question of limitation.

Case-law discussed.

Appeal against the order of the Hon'ble Mr. Justice Mockett dated the 1st May, 1940 and made in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in O. P. No. 34 of 1940.

S. Parthasarathy and *V. K. Tiruvenkatachari* for Appellant.

V. Ramaswami Aiyar, S. Nagaraja Aiyar, A.K. Sriraman and *N. G. Krishna Aiyangar* for Respondents.

The judgment of the Court was delivered by

Leach, C.J.

The Chief Justice.—The appellant is the liquidator of the Mahalakshmi Studios Limited, which went into voluntary liquidation on the 5th of November, 1939. The appellant, as it was his duty to do, settled a list of contributories, and, as nineteen of the persons on the list did not comply with the calls made upon them, he applied to this Court for an order under S. 216 of the Indian Companies Act. Of the nineteen respondents, respondents 1 to 8 and the father of the nineteenth respondent signed the memorandum of association in respect of the shares subscribed for by them, but had not paid for their shares. The other respondents to the petition were not signatories to the memorandum of association, but had not paid what was due by them on the allotment of their shares. The application was heard by Mockett, J., who refused to make any order against the respondents and directed the liquidator to file suits to recover the amounts which he claimed. In dismissing the petition, the learned Judge held that the appellant was not entitled to make calls on the respondents and it is this part of the judgment which has really occasioned the present appeal, because if it stands this decision of the learned Judge will in an important respect govern the suits to be filed. The appellant contends that this finding is erroneous and he asks this Court to direct the respondents to pay the amounts claimed without requiring him to file suits.

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In holding that the amounts due from the respondents could not be made the subject of calls, the learned Judge relied on *Alexander* v. *Automatic Telephone Company*[1], *Croskey* v. *The Bank of Wales*[2] and *Mohun Lall* v. *Sri Gungaji Cotton Mills Co*[3], but all these cases concerned companies which were not in liquidation and this makes a vast difference. We agree with the learned Judge that the directors could not have made calls in respect of the amounts alleged to be due by the respondents and that until the company went into liquidation, these amounts could only be classified as debts due to the company. Directors can make calls only when shares have been issued as partly paid. In such circumstances they can make calls for what is due by shareholders, bearing of course, in mind the conditions of the contract under which they were issued and the articles of association. But where a shareholder has failed to pay for shares allotted to him as a signatory to the memorandum of association or on application he can, in the event of the company going into liquidation, be placed upon the list of contributories and the liquidator can make a call upon him for what is due, in which case the Court can enforce the call without requiring the liquidator to institute a suit.

S. 156 (1) of the Indian Companies Act says:

"In the event of a company being wound up, every present and past member shall, subject to the provisions of this section, be liable to contribute to the assets of the company to an amount sufficient for payment of its debts and liabilities and the costs, charges and expenses of the winding up, and for the adjustment of the rights of the contributories among themselves, with the qualifications following."

Then follow seven qualifications. We are only concerned with the fourth, which says:

"In the case of a company limited by shares, no contribution shall be required from any member exceeding the amount (if any) unpaid on the shares in respect to which he is liable as a present or past member."

Therefore, a member can be required to pay the amount remaining unpaid on shares held by him whether it is the result of a failure to pay what he should have paid on the allotment of the shares or what is due in respect of shares issued to him as partly paid up. S. 158 defines the term 'contributory' and it includes every person liable to contribute to the assets of a company in the event of its being wound up.

1. (1900) 2 Ch.D. 56. 2. (1863) 4 Giff. 314: 66 E.R. 726.
3. (1900) 4 C.W.N. 369.

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S. 159 provides that the liability of a contributory shall create a debt payable at the time specified in the calls made upon him by the liquidator and S. 187 gives power to the Court to make calls in liquidations ordered by the Court. S. 212 gives a liquidator of a Company in voluntary liquidation power to settle a list of contributories and states that the list of contributories settled by him shall be *prima facie* evidence of the liability of the persons named therein to be contributories. S. 216 empowers the liquidator in a voluntary winding up to apply to the Court to enforce calls made by him. Therefore, so far as this appeal is concerned, there is no real difference between a company which is being compulsorily wound up and a company which is in voluntary liquidation.

It has been contended by Mr. Ramaswami Aiyar that a debt which could not have been made the subject of a call by the directors cannot be made the subject of a call by the liquidator. But this contention ignores the plain wording of Ss. 156 and 158. If a person is rightly placed on the list of contributories the liquidator can make a call upon him and we see nothing in the Act or in the authorities which lends the slightest support to the suggestion that the respondents here were not rightly placed on the list of contributories, subject of course to their answers which have not yet been the subject of inquiry.

In Lindley's Law of Companies (6th edition p. 573) there is this passage:

"There are two kinds of calls. First, there are those calls which are nothing more than the unpaid portions of the nominal capital of a company; and, secondly, there are those calls which are contributions required after that capital has been raised and exhausted. Calls of the first kind are payable by virtue of the agreement entered into by the subscribers and the shareholders to contribute the sums fixed upon as the capital; but calls of the last kind are payable in consequence of the liability of shareholders to discharge their debts. If this liability is unlimited, the amount of calls (of the second kind) which a shareholder may be compelled to pay, depends entirely on the amount of the debts to be liquidated, and upon the number of the solvent co-shareholders, But no shareholder can be required to pay calls of the first kind beyond his unpaid proportion of the capital of the company."

In In re *Whitehouse & Co.*,[1] Jessel, M. R. referring to S. 38 of the English Companies Act, 1862, which corresponds to S. 156 of the Indian Act, said:

"First of all, it must be remembered that the 38th section of the Act which directs what is to be paid in the case of a winding up by the share-

1. (1878) 9 Ch. D. 595 at 599.

holders of a limited company, creates new rights and rights which did not exist before the passing of the Companies Act, 1862, and rights which do not exist till there is a winding up. That point was decided by the House of Lords in the case of *Webb* v. *Whiffin*[1], that it was in fact a new right, or rather a new liability as regards the shareholders; and that section alone, for this purpose, regulates their liability."

In *In re Hull & County Bank*[2], which was decided two years later, Jessell, M. R. said:

"Now, what is the position of the applicant? Taking it in the most favourable way for him, he has been induced to become a shareholder by fraudulent misrepresentation. Can he after winding up be relieved? I think he cannot. The first ground to be considered is this: that the winding up order entirely alters the positions of the parties, that is, it makes the shareholders contributories, and contributories in a totally different way in some respects as regards the debts and liabilities of the concern from what they were before. It has been decided by a series of decisions in the House of Lords, commencing with *Webb* v. *Whiffin*[1], that the 38th section of the Companies Act is not to be read otherwise than literally, and it is not to be read with reference to the previous liabilities of the shareholders or by analogy to the law of partnership whether of a limited or unlimited character, but it is to be read as imposing new liabilities on the members of the company—liabilities imposed and defined by that section."

The Privy Council in *Hansraj Gupta* v. *Asthana*[3], an appeal from the Allahabad High Court, said:

"On the winding up, S. 156 of the Indian Companies Act came into play. His liability under that section in respect of the shares was absolute and flowed from the fact of his being on the register in respect of those shares. The original contract may supply the reason for his name having been placed on the register in respect of the shares, but after the winding up his liability in respect of the shares arose *ex lege* and not *ex contractu*."

In view of the wording of the relevant sections and in the light of these very authoritative expressions of opinion, we hold that the learned Judge erred in saying that the demands made by the appellant for the amounts claimed were not 'calls' at all. Assuming that the respondents were rightly placed on the list of contributories, the liquidator was entitled to make calls upon them and the amounts became payable irrespective of any question of limitation. See *Vaidiswara Aiyar* v. *Sivasubramania Mudaliar*[4].

It remains to be considered whether the appellant is entitled to have an order from the Court under S. 216. The contesting respondents have raised several defences and after careful thought we see no reason why the decision of the

1. (1872) L.R. 5 H.L. 711.
2. (1880) 15 Ch. D. 507 at 511.
3. (1932) 60 I.A. 1 at 11: I.L.R. 54 All. 827 at 839: 63 M.L.J. 859, 866 (P.C.).
4. (1907) I.L.R. 31 Mad. 66.

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learned Judge in directing the liquidator to file suits should be interfered with but these suits will be tried in the light of this judgment.

The liquidator will have his costs of this appeal out of the assets of the company. The respondents will pay their own costs.

K. S. —— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE HAPPELL.

Husain Batcha Sahib .. *Appellant** (*Appellant*)

v.

The Secretary of State for India in Council, represented by the Collector of North Arcot and another. *Respondents* (*Respondents*).

Husain Batcha Sahib v. Secretary of State for India in Council.

Limitation Act (IX of 1908) Arts. 120 *and* 131—*Applicability—Suit by mutawalli for a declaration of his right to receive the* yeomiah *allowance—Limitation.*

A suit against the Secretary of State was brought by the holder of the office of mutawalli and katheeb of a mosque for a declaration that he was entitled to the *yeomiah* allowance as the lawful holder of the office. On objection being taken that he was not entitled to claim the allowance as the suit had not been brought within six years of the death of the previous mutawalli,

Held, that *Ghulam Ghouse Khan Sahib* v. *Jannia*, (1920) 39 M.L.J. 492 should be treated as overruled by the decision of the Privy Council in *Secretary of State* v. *Parashram Madhawrao*, (1934) 66 M.L.J. 614: L.R. 61 I.A. 190: I.L.R. 58 Bom. 306 (P.C.) and the suit being one to establish a periodically recurring right attached to the office of muttawalli the only Article applicable is Art. 131 and not Art. 120. The suit having been brought within twelve years of the Secretary of State's refusal to recognise the validity of the plaintiff's claim is therefore in time.

Appeal under Cl. 15 of the Letters Patent against the decree and judgment of the Honourable Mr. Justice Wadsworth dated 2nd February, 1939, and passed in S. A. No. 275 of 1935[1] preferred to the High Court against the decree of the District Court of North Arcot at Vellore in A. S. No. 270 of 1933 (O. S. No. 608 of 1931, District Munsif's Court, Ranipet).

B. Pocker for Appellant.

The Government Pleader (*B. Sitarama Rao*) and *V. T. Rangaswami Aiyangar* for Respondents.

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* L. P. A. No. 17 of 1939. 6th December, 1940.

1. (1939) 1 M.L.J. 476.

Husain Batcha Sahib v. Secretary of State for India in Council.

Leach, C.J.

The judgment of the Court was delivered by

The Chief Justice:—The appellant is the mutawalli and katheeb of a mosque in the village of Sattur, which is situated in the Wallajah Taluk of the North Arcot District. In the days of the Nawabs of the Carnatic a yeomiah allowance of Rs. 88-8-0 per annum was granted to the mutawalli of this mosque. The immediate predecessor of the appellant in the office of mutawalli was one Mohamed Ali, who died in the year 1918. While he held the office of mutawalli he was in receipt of this yeomiah allowance, which is now payable by the Government. After his death the Government paid this allowance to his widow, the second respondent in this appeal. The appellant's formal appointment to the office of mutawalli took place on the 17th December, 1919 and having taken up the duties of mutawalli he claimed to be entitled to the yeomiah allowance by virtue of his appointment, but the Government, refused to recognise the claim. Apparently the attitude taken up by the Government was that they were entitled to pay the allowance to Mohamed Ali's widow as an heir of the original grantee.

In 1921 the appellant instituted a suit in the District Court of North Arcot against the widow for a declaration that he was entitled to the office of mutawalli and other offices attached to the mosque. He obtained a decree, but the Government still refused to recognise his claim to be entitled to the yeomiah allowance and consequently the appellant filed the suit out of which this appeal arises to compel payment to him. The suit was filed on the 14th December, 1931 in the Court of the District Munsif of Ranipet. The appellant claimed *inter alia* a declaration that he was entitled to the yeomiah allowance by reason of the fact that he was the lawful holder of the office of mutawalli. Originally the only defendant was the Secretary of State but, on objection being taken by the Secretary of State, the widow was added as a party. The District Munsif held that the appellant was entitled to the offices of mutawalli and katheeb, but that he was not entitled to claim the yeomiah allowance because the suit had not been brought within six years of the death of Mohamed Ali. Following the decision of this Court in *Ghulam Ghouse Khan Sahib* v. *Jannia*,[1] he held that the plaintiff's claim fell within Art. 120. In these circumstances

1. (1920) 39 M.L.J. 492.

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the District Munsif did not inquire into the appellant's claim that the yeomiah allowance attaches to the office of mutawalli. The appellant appealed to the District Judge of North Arcot, but the District Judge concurred in the findings of the District Munsif and dismissed the appeal. The appellant then appealed to this Court and again was unsuccessful. The appeal was heard by Wadsworth, J., who also considered that the suit was governed by the decision in *Ghulam Ghouse Khan Sahib* v. *Jannia.*[1] The learned Judge, however, gave certificate which has permitted the filing of the present appeal under Cl. 15 of the Letters Patent. If the case is governed by *Ghulam Ghouse Khan Sahib* v. *Jannia,*[1] it is quite clear that the suit is out of time, but the learned Advocate for the appellant contends that this decision has in effect been overruled by the Privy Council in *Secretary of State* v. *Parashram Madhawrao,*[2] and we consider that this contention is well founded.

In *Ghulam Ghouse Khan Sahib* v. *Jannia,*[1] Ayling and Coutts Trotter, JJ., held that a right to a yeomiah allowance must be classified as a perpetual right and not as a periodically recurring right. Consequently they said that such a suit was governed by Art. 120 and not Art. 131 of the Limitation Act. Art. 120 is the residuary article in Part VII of the Act. It fixes the period of limitation at six years which commences from the date when the right to sue accrues. Art. 131 prescribes a period of twelve years for a suit to establish a periodically recurring right. The time begins to run when the plaintiff was first refused the enjoyment of the right. The learned Judges who decided *Ghulam Ghouse Khan Sahib* v. *Jannia,*[1] said that:

> "The mere fact that sums of money are paid periodically does not make the right one which periodically recurs; the right is always there but it is only exercised at such times as the sums fall due."

In the *Secretary of State* v. *Parashram Madhawrao,*[2] the plaintiff claimed that he was entitled to receive an annuity consisting of a percentage of the assessments from time to time made on certain villages and payment of arrears on that basis. The Secretary of State averred that the plaintiff was only entitled to a fixed annual sum and said that the suit was barred by the law of limitation. The Privy Council decided that the

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1. (1920) 39 M.L.J. 492.
2. (1934) 66 M.L.J. 614: L.R. 61 I.A. 190: I.L.R. 58 Bom. 306 (P.C.).

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plaintiff's claim was well founded and that his suit was not time-barred, because it was governed by Art. 131 of the Limitation Act and had been brought within 12 years of the Secretary of State's refusal to accede to the plaintiff's claim.

The learned Government Pleader has rightly conceded that the only distinction which can be drawn between the *Secretary of State* v. *Parashram Madhawarao*,[1] and the present case is that in the former case the allowance payable to plaintiff varied from year to year and in this case the allowance is fixed. What difference this makes we are at a loss to understand. If the claim in *Secretary of State* v. *Parashram Madhawrao*,[1] was governed by Art. 131, as it was, this suit must be governed by the same article. Accordingly we hold that *Ghulam Ghouse Khan Sahib* v. *Jannia*,[2] should no longer be followed.

The appellant filed the present suit to establish a right to an annual payment which he said was attached to the office of mutawalli of this particular mosque and admittedly it has been filed within twelve years of the Secretary of State's refusal to recognise the validity of the appellant's claim. It has been suggested that because the Secretary of State has conceded that the Government is bound to make this annual payment the suit cannot be classified as one to establish a periodically recurring right, but this argument overlooks the fact that the plaintiff is suing for a declaration that the right to this annual payment attaches to the office which he holds. This is denied. Therefore it is a suit to establish a periodically recurring right alleged to be attached to the office. Looked at in the light of the judgment of the Privy Council in the *Secretary of State* v. *Parashram Madhawrao*,[1] the only Article of the Limitation Act applicable is Art. 131.

For these reasons we allow the appeal and remand the case to the trial Court to hear and decide the issues left undecided. The appellant is entitled to his costs in the District Court and of the two appeals in this Court. The costs in the trial Court will abide the result of the suit. The appellant is entitled to refund of the Court fee paid on the memorandum of appeal.

K. S. *Appeal allowed.*

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1. (1934) 65 M.L.J. 614: L.R. 61 I.A. 190: I.L.R. 58 Bom. 306 (P.C.).
2. (1920) 39 M.L.J. 492.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PANDRANG ROW AND MR. JUSTICE ABDUR RAHMAN.

The District Board of West Tanjore, represented by its President. *Appellant** (*Plaintiff*)

v.

The Secretary of State for India in Council, represented by the Collector of Tanjore. *Respondent* (*Defendant*).

District Board of West Tanjore *v.* Secretary of State for India in Council.

Land Tenure—Whole inam village—Urlam case if held applicable to inam villages by decision in Viranvayal case.

Viranvayal case (*Secretary of State for India in Council* v. *Subramania Aiyar*, 1933 M.W.N. 559: 64 M.L.J. 715 (P.C.)) cannot be treated as a decision that Urlam case (*Prasad Row* v. *Secretary of State for India in Council*, (1917) 33 M.L.J. 144: L.R. 44 I.A. 166: I.L.R. 40 Mad. 886, applies to whole inam villages as it was not necessary to decide the question in view of the fact that the inamdar (temple) in that case owned the soil of the river *ad medium filum*.

Appeals against the decrees dated 29th March, 1937, of the Court of the Subordinate Judge of Tanjore in O. S. Nos. 77 of 1933, 11 of 1936 and 13 of 1935 respectively.

T. R. Venkatarama Sastri and *T. B. Balagopal* for Appellant.

The Government Pleader (*B. Sitarama Rao*) for Respondent.

The judgment of the Court was delivered by

Pandrang Row, J.

Pandrang Row, J.—These connected appeals have been argued together and they raise the same point. All of them arise out of suits instituted by the District Board, Tanjore against the Secretary of State for India in Council. The suits are for refund of water cess and land cess thereon collected by the Government from the District Board in respect of certain lands in whole inam villages for different faslis. Appeal No. 215 of 2937 relates to the claim for refund of cess for ten years, that is faslis 1333 to 1342 and the claim is for over Rs. 43,000. Appeal No. 95 of 1938 relates to the water cess for fasli 1343 and Appeal No. 216 of 1937 to the water cess for fasli 1344. These suits however do not raise the claim in a general way that is, not on the basis of any proprietory right claimed by the District Board, but on the basis of a certain

* Appeals Nos. 215 and 216 of 1937 and 95 of 1938. 12th August, 1940.

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compromise entered into between the parties in an earlier litigation of 1921. In other words, we have not to decide whether the District Board has the right to irrigate the lands in the villages without payment of water cess, but whether the event that was contemplated in the compromise of 20th September, 1923, (Ex. A) has happened. That event is, to use the words of the compromise, 'if the Privy Council should decide in any case that may hereafter be taken to it that the decision in the Urlam case is applicable to inam villages.' If this has happened, that is, if the Privy Council has decided in any case taken to it subsequently to the compromise of September, 1923, that the Urlam decision applies to whole inam villages, then the plaintiff's claim in the present suit can be said to be maintainable, subject of course to the decision on the other issues raised in these suits which have not been disposed of in the Court below. The point therefore that arises for decision in these appeals is only this, though it is made the subject-matter of no less than three issues in the Court below, namely issues 6 to 8 which run as follows:

(6) Has the contingency contemplated by the agreement of compromise happened?

(7) What are the true terms of the compromise agreement referred to in the plaint;

(8) What is the effect of the Privy Council decision reported in *Secretary of State for India* v. *Subramania Aiyar*[1]? Has it held that the decision of the Urlam case applies to inam villages as well?

It will be seen that according to the plaintiff-appellant the decision of the Privy Council reported in *Secretary of State for India* v. *Subramania Aiyar*[1], that is the decision in Privy Council Appeal No. 119 of 1931 delivered on the 20th February, 1933, held that the decision in the Urlam case applies to whole inam villages.

Though the point for decision is comparatively simple and short, the argument before us has ranged over a wide field, most of which on the appellant's side was intended to show that it follows from the Urlam decision as explained and commented upon in a subsequent case namely, *Secretary of State for India* v. *Subbarayudu*[2], that the decision in the Urlam case is applicable to whole inam villages situated in non-zamindari areas. This argument was however only introductory to the real argument in the case which was no doubt that the actual

1. 1933 M.W.N. 559: 64 M.L.J. 715 (P.C.).
2. (1931) 62 M.L.J. 213: L.R. 59 I.A. 56: I.L.R. 55 Mad. 268 (P.C.).

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decision in the Urlam case was applied to inam villages in the case reported in *Secretary of State for India* v. *Subramania Aiyar*[1], which will be referred to for the sake of brevity as the Viranvayal case. We are not really concerned in these appeals to decide whether as a matter of fact the principles enunciated in Subbarayadu's case necessarily lead to the conclusion that the decision in the Urlam case which applied to zamindari lands including pre-settlement inams in a zamindari would apply to inam villages in Government ryotwari tracts as in the present case. That question has been decided in the affirmative in more cases than one by this High Court and it is enough to refer in this connection to the cases reported in *Yahya Ali Sahib* v. *The Secretary of State*[2], *The Secretary of State for India in Council* v. *Aiyanar Kone*[3] and S. A. Nos. 309 and 310 of 1928, which are now pending in appeal before the Privy Council. What we have to decide is not whether as a matter of law it follows from the earlier decisions of the Privy Council in the Urlam case and in Subbarayadu's case that irrigation of lands in whole inam villages in ryotwari tract is governed by the same principles as are applicable to irrigation of lands within zamindari tracts, but whether as a matter of fact a decision to this effect was pronounced in the Viranvayal case. The judgment in the Viranvayal case deals with two points, namely (1) whether the river from which water was taken for irrigation belonged to the Government and (2) whether the water in question was supplied from works constructed by the Government. Both these points were found against the Government. There is no express decision in the judgment to the effect that the decision in the Urlam case applies to inam villages in ryotwari tracts or to put it in a slightly different form, in non-zamindari tracts. There is no reference whatever to the Urlam case in the judgment of the Privy Council in the Viranvayal case. The judgment no doubt refers to Subbarayadu's case as having finally decided the question that where the riparian owner owns the bed of the stream up to the *medium filum*, the river could not be said to belong to the Government. Or, in other words, if the Government sought to establish that the stream belonged to them, they would have to show that they

1. 1933 M.W.N. 559: 64 M.L.J. 715 (P.C.).
2. (1927) 53 M.L.J. 769.
3. (1935) 69 M.L.J. 552.

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owned the whole bed of the river. In the Viranvayal case the fact that half the bed of the river up to the *medium filum* belonged to the inamdar (the Rameswaram Devasthanam in that case) was not denied before their Lordships of the Privy Council who observed at the end of the discussion referred to above that:

"The claim of the Government to payment of cess therefore failed in that respect and was not contended for before their Lordships."

The pleadings in that suit also show that ownership of half the bed and the demarcation of half the bed as part of the inam village were alleged in the plaint and were not denied by the Government, and indeed, in view of the decision of the Survey authorities which was not attacked by the Government, could not be denied. It is thus clear that the decision of their Lordships of the Privy Council in the Viranvayal case on this point, namely, whether the river belonged to the Government was decided on the only ground that the Government could claim the river to belong to them only if they showed that they owned the whole bed of the river and not on the basis of any grant of lands abutting the river which carried with it easementary or riparian rights as in the Urlam case and in Subbarayadu's case. The contention of the Government has throughout been that the Viranvayal case has not settled the question of the applicability of the decision in the Urlam case to inam villages in non-zamindari areas and in particular to inam villages included in the inam settlement. Their case has been that at the Inam settlement there was no grant by the Government, except where there was a new grant and that in the case of old grants, what the Inam settlement did was merely to recognise the state of things which existed before, and to leave the rights of the inamdars in the same condition as they were before the settlement. This contention is indeed supported by Act VIII of 1869 which is referred to by their Lordships of the Privy Council in *Secretary of State for India* v. *Srinivasachariar*[1]. Their Lordships observed as follows in that case which was a case relating to a shrotriam village:

"it was rightly decided by the final Appellate Bench of the High Court that the title deed of the Inam Commissioners conferred no higher title than was originally granted. There is language in the Act of 1862 that might possibly be read as having the effect for which the plaintiffs contend, but this was corrected by Act VIII of 1869, and it is now clear that though a

1. (1920) 40 M.L.J. 262: 48 I.A. 56: I.L.R. 44 Mad. 421 (P.C).

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larger interest was created, nothing done under the Inam Commission could vest in the inamdars a subject-matter not already belonging to them".

In the Urlam case itself, vide *Prasad Row* v. *The Secretary of State for India*[1] their Lordships expressly stated that it was in their opinion unnecessary to consider the terms of the original inam grants or the effect of any subsequent inam settlement. This observation was made when dealing with the inam lands that were included in the subject-matter of that case. The appellant's advocate, Mr. Venkatarama Sastri relies almost entirely on the following sentence or part of a sentence in the judgment of their Lordships of the Judicial Committee in the Viranvayal case: "The facts in this case were that the temple authorities were riparian owners"; the sentence, however, continues as follows: "and that they owned the soil of the river *ad medium filum*". As observed already, the latter fact is itself sufficient to dispose of the contention that the river in question belonged to the Government which was the point that was being considered by their Lordships. It must also be observed that this sentence immediately follows the following two sentences: "The first was as to whether this river from which the water was derived for irrigation belonged to the Government. That was a point which had been in controversy in principle for a considerable time in Madras". Then comes the sentence extracted above which starts with the words: "the facts in this case were". It seems to us that the controversy in principle which had existed for a considerable time in Madras relating to this point was not actually decided in the Virnavayal case because the fact in that case which was established beyond doubt *viz.*, that the inamdar owned the soil of the river *ad medium filum*, made it unnecessary for their Lordships to decide this general controversy regarding the ownership of rivers in the Madras Presidency. It seems to us that it is not at all likely that their Lordships of the Judicial Committe decided or intended to decide a controversy of this importance by merely reciting the facts of the case before them; these two facts, and indeed only one of them could furnish sufficient ground for the decision of the point that arose in that case, namely that the temple authorities, *i.e.*, the inamdars, were the riparian owners and that they owned the soil of the river *ad medium filum*. This statement of fact cannot in our opinion be regarded as a

1. (1917) 33 M.L.J. 144: 44 I.A. 166: I.L.R. 40 Mad. 886 at 908.

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decision of a controversy which had existed in principle for a considerable time in Madras. Nor could it be deemed to decide the controversy which did exist as regards the ownership of rivers and the right to irrigate free of charge between the Government and Inamdars of whole inam villages in non-zamindari areas. *Prima facie* the decision of that controversy would depend on the character and effect of the Inam settlement and also on the nature of the grant in each case for whenever the question of what passed at the time of an inam grant has to be decided, the particular grant in question has to be looked into and no general rule can be laid down that whenever an inam village is granted, particular rights of property invariably pass to the grantee. It would appear from the statement of the Government in their reply to the District Board (Ex. G.) that in the Viranvayal case the Privy Council gave no ruling as to the applicability of the Urlam decision to whole inam villages, although counsel for the Government was specifically instructed to obtain a ruling on this point. No doubt this particular statement in the Government's order has not been sought to be established by evidence but the statement made by the Government cannot be entirely ignored, though if the judgment of their Lordships in the Viranvayal case contained a clear decision of the point namely, the applicability of the Urlam decision to whole inam villages, the Government's statement contained in Ex. G, could not be given any weight whatsoever. But where the judgment itself so far as it relates to this point is even according to the appellant's own counsel limited to one sentence or is to be found in one single sentence, it becomes necessary to consider whether the Government's statement is not perhaps a statement of what actually happened, because if their Lordships intended to pronounce a decision on this point, they would have done so expressly and after some discussion than in the manner in which it is suggested to us on behalf of the appellant that their Lordships did in the Viranvayal case. We find ourselves unable to assent to the view pressed upon us on behalf of the appellant, namely, that as a matter of fact the decision of their Lordships of the Privy Council in the Viranvayal case reported in *Secretary of State* v. *Subramania Ayyar*[3] actually decided that the decision in the Urlam case is applicable to inam villages.

1. (1933) 64 M.L.J. 715: 1933 M.W.N. 559 (P.C.).

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In other words, we are not satisfied that the judgment of the lower Court on this point is erroneous.

The appeals therefore fail and are dismissed with costs.

S.V.V. *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE HAPPELL.

Ganta Bangarigadu and others .. *Appellants* (Defendants 1 to 3 and 5 to 9)*

v.

Paltheru Atchutaramayya and another. *Respondents (Plaintiff and Nil).*

Bangarigadu v. Atchutaramayya.

Madras Estates Land Act (I of 1908), S. 52 (3)—Patta for one year—Right of holder of patta to remain in occupation after the expiry of the year until fresh patta is issued—If makes the patta a lease for more than a year requiring registration under Registration Act (XVI of 1908), S. 17—Land in possession of trespassers at the time of grant of patta—Suit by tenant after the expiry of a year against the trespassers for possession—Maintainability—Landlord added as party only in second appeal and more than twelve years after date of trespass.

Where a landholder granted a patta to a person for one year and the land being in the possession of trespassers on the date of the lease the tenant instituted a suit in ejectment against the trespassers but only after the expiry of the one year covered by the lease without making the landholder a party and the landholder on being added as party defendant in second appeal more than twelve years from the date of the trespass signified his assent to the tenant getting possession,

Held, (*i*) that the patta being a lease for one year in the particular case did not require registration and that it continued in force until a new patta and muchilika were exchanged, by virtue of S. 52 (3) of the Madras Estates Land Act and that the tenant can maintain a suit in ejectment against the trespassers;

(*ii*) that as the landholder had signified his assent to the tenant's getting possession the case fell directly within the ruling in *Venkayya* v. *Sateyya*, (1911) I.L.R. 37 Mad. 281, and a decree for possession can be passed in favour of the tenant.

Appeal under Cl. 15 of the Letters Patent against the judgment and decree of the Hon'ble Mr. Justice Wadsworth dated 19th September, 1939 and passed in S. A. No. 106 of 1934 preferred to the High Court against the decree of the

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L.P.A. No. 6 of 1940. 21st November, 1940.

Court of the Subordinate Judge of Vizagapatam in A. S. No. 295 of 1931 preferred against the decree of the Court of the District Munsif of Parvatipur in O. S. No. 556 of 1939.

Bangarigadu v. Atchutaramayya.

V. Subramanyam and *B. V. Subramanyam* for Appellants.

P. Satyanarayna Rao for *P. Somasundaram* and *S. Ramamurthi* for Respondents.

The Judgment of the Court was delivered by

Leach, C.J.

The Chief Justice:—On the 16th September, 1928 the first respondent was granted a patta by the second respondent for land situate within the jurisdiction of the District Munsif's Court of Parvatipur. The land covered by the patta admittedly forms part of an estate within the meaning of the Madras Estates Land Act, 1908. The appellants were in possession of the land at the time, but they were trespassers. The first respondent did not take steps immediately to evict them and in fact allowed them to continue in possession of the land until the 30th September, 1929, when he filed the present suit in the District Munsif's Court for their eviction. The defence of the appellants was successful. The District Munsif held that the first respondent was not entitled to maintain the suit as his patta had expired when the plaint was filed and the landholder had not been made a party.

On appeal by the first respondent the Subordinate Judge of Vizagapatam concurred in the decision of the District Munsif. The first respondent then appealed to this Court. His appeal was heard by King, J, who decided that the second respondent, as the landholder, should be made a party to the suit and passed an order to this effect. As the result, the case was remanded to the Subordinate Court for a finding as to whether the appellants had been in adverse possession of the property for twelve years. The Subordinate Judge after considering the evidence adduced by the parties on this question reported that the appellants had not been in possession for twelve years on the date of the filing of the suit. King, J., was on leave when the report was received by this Court and therefore it had to be considered by another Judge. The case came before Wadsworth, J., who on the finding of the Subordinate Judge, allowed the appeal and decreed the suit. A certificate having been given under cl. 15 of the Letters Patent the respondents have preferred the present appeal.

Bangarigadu v. Atchutaramayya.

Leach, C. J.

In the opinion of King, J., the case came within *Venkayya* v. *Sateyya*[1]. The appellants say that the learned Judge here erred. They also advance the contention that they must be deemed to have been in adverse possession up to the date when the second respondent was made a party as the result of the order of King, J., namely the 31st March, 1938 and not merely up to the date of the institution of the suit. If the 31st March, 1938 is the date which has to be taken, the appellants have, of course, been in adverse possession for over twelve years. The appellants have advanced the further argument that the patta cannot be relied upon by the first respondent because it has not been registered.

In *Venkayya* v. *Sateyya*[1], a lessee whose lease had expired before the date of the filing of his plaint sued for possession of the land leased to him, the defendant being a trespasser. The landholder was made a party and it was held that inasmuch as he had acquiesced in the plaintiff obtaining a decree the trespasser was not in a position to resist the suit. This decision is binding on us and we can see no difference in principle between that case and the present one. The fact that the landholder here was not made a party at the inception of the suit does not change the effect of her acquiescence. The landholder is the second respondent and she supports the first respondent in his claim. Therefore he is entitled to the possession of the land as against the appellants subject to the plea of adverse possession. We consider that King, J., was fully justified in holding that the case falls within *Venkayya* v. *Sateyya*[1].

But even if it did not, we still consider that the first respondent could maintain the suit. He obtained a valid patta from the landholder by virtue of which he was entitled to the possession of the land. Mr. Subramanyam, on behalf of the appellants, admits that the respondent could have maintained the suit if it had been filed within the year. The fact that the suit was not, however, filed within the year does not alter the first respondent's title. By reason of S. 52 of the Madras Estates Land Act, his rights as the pattadar of the land continued after the expiry of the year. Cl. (3) of that section states that a patta shall remain in force until the commencement of the new year for which a fresh patta is accepted. No

1. (1911) I.L.R. 37 Mad. 281.

Bangari-gadu v. Atchuta-ramayya.

Leach, C. J.

fresh patta has been issued by the landholder in respect of the land in suit and therefore the patta which was issued to the first respondent on the 16th September, 1928 was a valid patta on the date of the institution of the suit.

Nor do we see any substance in the argument that the patta required registration if it was to be enforced after the expiration of the twelve months. On the face of the patta it is a lease for one year and S. 17 of the Registration Act does not require such a lease to be registered. The fact that S. 52 of the Madras Estates Land Act permits the holder of a patta for a year to remain in occupation of the land after the expiration of the period until a fresh patta is issued does not turn the document into a lease for more than a year within the meaning of S. 17 of the Registration Act. If the term mentioned in the patta had been for a longer period than a year registration would have been necessary, but not otherwise.

We are also unable to accept Mr. Subramanyam's contention that for the purpose of calculating how long the appellants have been in adverse possession the date on which the second respondent was made a party to the suit must be taken. The adding of the second respondent as a party did not alter the position between the first respondent and the appellant. Of course, if the first respondent was asking for relief against the second respondent, the 31st March, 1938 would have been the material date against her, but the first respondent is asking for no relief against her. As we have already mentioned she is acquiescing in the demands of the first respondent for possession of the land in suit. The evidence shows that the appellants only came into possession of the land some six years before the patta was granted. Therefore the first respondent was entitled by reason of his patta to oust them.

For these reasons the appeal fails and must be dismissed with costs in favour of the first respondent.

K. S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, AND MR. JUSTICE HAPPELL.

Doraisami Naicken .. *Appellant** (*1st Respondent, 2nd plaintiff*)

v.

Peru Su Aru Periakaruppan Chettiar and others) *Respondents,* (*Appellant and Respondents, 2 to 4*).

Doraisami Naicken *v.* Periakaruppan Chettiar.

Limitation Act (IX of 1908), S. 20 (2)—Applicability—Mortgagee going into possession under invalid sale after preliminary decree—Receipt of rents and profits while in possession—If saves limitation for application for a final decree.

The equity of redemption of certain mortgaged properties had been attached by the holder of a money decree against the mortgagors. During the subsistence of the attachment the appellant (mortgagee) obtained a preliminary decree on his mortgage in April, 1926 and in July, got a conveyance of the mortgaged properties from the mortgagors in satisfaction of the mortgage debt and went into possession. In 1932 he was dispossessed by the respondent who had caused the properties to be sold subject to the mortgage in execution of the money decree and had become the purchaser at the Court sale. In October, 1933, the appellant filed an application in his suit for a final decree. On a contention whether S. 20 (2) of the Limitation Act will apply and the application was within time,

Held, that the fact that the sale to the mortgagee proved to be invalid could not vitiate the appellant's title as mortgagee and the rents and profits which he received must in the circumstances be deemed to have been received by him as mortgagee, and such receipt of rents while in possession of the mortgaged properties will attract S. 20 (2) of the Limitation Act and the application for a final decree was therefore in time.

Decision of Patanjali Sastri, J., reported in (1940) 1 M.L.J. 134, reversed.

Appeal under Cl. 15 of the Letters Patent against the decree and judgment of the Honourable Mr. Justice Patanjali Sastri dated 31st October, 1939 and passed in S. A. No. 585 of 1936 preferred against the decree of the District Court of Coimbatore in A. S. No. 222 of 1934 preferred against the order of the Court of the Subordinate Judge of Coimbatore dated 27th January, 1934 and made in I.A. No. 764 of 1933, in O. S. No. 221 of 1925, on the file of the Sub-Court, Coimbatore.

K. Rajah Iyer for Appellant.

S. Ramachandra Iyer for Respondent.

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* L. P. A. No. 10 of 1940. 20th December, 1940.

Doraisami Naicken v. Periakaruppan Chettiar.

The Court delivered the following

JUDGMENT:—Two questions relating to the law of limitation have been argued in this appeal. On the 8th April, 1926 the appellant obtained in the Court of the Subordinate Judge of Coimbatore a preliminary mortgage decree for Rs. 4,772 with interest and costs, amounting altogether to Rs. 5,856—6—6, against one Muthu Goundan and his two sons, a period of six months being allowed for redemption. The respondent was impleaded as the fifth defendant in the suit. He had obtained a money decree against the mortgagors and had attached the equity of redemption of the mortgaged properties. The attachment was continuing at the time of the passing of the preliminary decree on the 8th April, 1926. In the month of July 1926 the mortgagors conveyed the mortgaged properties to the appellant in satisfaction of the mortgage debt. Thereupon the appellant went into possession of the properties and remained in possession until 1932 when he was dispossessed by the respondent, who had caused them to be sold in execution of his decree and had become the purchaser at the Court sale. The properties were sold subject to the appellant's mortgage and on the 27th October, 1933 the appellant filed an application in his suit for a final decree for sale. The respondent pleaded that the application was barred by the law of limitation, but the Subordinate Judge and the District Judge on appeal held that it had been filed within time. The respondent then appealed to this Court and the appeal was heard by Patanjali Sastri, J., who allowed it. The present appeal is from the judgment of Patanjali Sastri, J.

The first of the two questions raised is whether S. 20 (2) applies here. If it does apply the appellant's application for a final decree is in time. Patanjali Sastri, J., held that the section did not apply and relied on the decisions of this Court in *Mahomed Yusuf v. Narayanan Pillai*[1], and *Fallesatha Banu v. Mahomed Rashiuddin Quraishi*[2]. The appellant says that the first decision is erroneous and the second decision has no application. He contends that the Calcutta High Court rightly decided the question in *Ramcharan Chakrabarti v. Nimai Mandal*[3]. The second question is whether the purchase of the properties by the respondent at the Court auction held in the

1. (1937) 2 M.L.J. 170.   2. (1934) 40 L.W. 595.
3. (1921) 35 C.L.J. 58.

Doraisami Naicken v. Periakaruppan Chettiar.

execution proceedings instituted by him revived the appellant's right to have a final mortgage decree passed in his favour, irrespective of S. 20.

Sub-S. (2) of S. 20 states that where mortgaged land is in the possession of the mortgagee, the receipt of the rent or produce of the land shall be deemed to be a payment for the purpose of Sub-S. (1), which deals with the effect of payment of interest as such or a part payment of principal. The first case in which the effect of Sub-S. (2) was considered was *Ramcharan Chakrabarti* v. *Nimai Mandal*[1]. The facts in that case were shortly these. A preliminary mortgage decree was passed on the 6th April, 1910 and the mortgagor was allowed six months in which to redeem. In 1912 the mortgagor agreed to transfer the equity of redemption to the mortgagees in satisfaction of what was due to them under the mortgage decree, and in pursuance of the agreement the mortgagees went into possession, but they never received a valid conveyance. On the 1st April, 1917, the mortgagor transferred the property to the fifth defendant, who dispossessed the mortgagees. On the 2nd October, 1917, the mortgagees applied for a final decree for sale, but the objection was taken that the application was time-barred. The Court which was composed of Asutosh Mukherjee and Panton, JJ., held that it was not time-barred. The Court said that S. 20 might well be construed to apply whenever mortgaged property is in the possession of the mortgagee. Where a mortgagee has obtained possession under an invalid agreement for sale he may be called upon to account for the rents and profits as if he were a mortgagee in possession. The Court also observed that a litigant cannot be permitted to take up inconsistent positions to the detriment of his opponent. If he does not regard the sale as being valid he must accept his opponent as the mortgagee, in which case S. 20 applies.

In *Mohamed Yusuf* v. *Narayana Pillai*[2] the facts were also very similar. In 1903 immoveable property was mortgaged to one Narayanaswami Iyer and in 1905 a second mortgage was created in favour of one Swaminatha Pillai. In 1906 Narayanaswami Iyer instituted a suit to enforce his mortgage without impleading the second mortgagee and bought the property in execution proceedings in 1908. In 1915 Narayana-

1. (1921) 35 C.L.J. 58.
2. (1937) 2 M.L.J. 170.

Doraisami Naicken v. Periakaruppan Chettiar.

swami Iyer sold the property to the plaintiff's father, and the plaintiff and the members of his family remained in possession up to the year 1928. In 1910 Swaminatha Pillai assigned his second mortgage to the fourth defendant, who in 1920 brought a suit on his mortgage, impleading Narayanaswami Iyer as the first mortgagee. The Court directed a sale and at the Court auction held in 1928 the fourth defendant bought the property. He obtained possession from the plaintiff, who filed the suit out of which the appeal arose to recover the amount lent on the mortgage of 1903. It was held that the suit was time-barred. Venkataramana Rao, J., said that as the plaintiff and his family had been in possession as purchasers, not as mortgagees, they must be deemed to have received the rents and profits in the capacity of owners and not as standing in the place of the first mortgagee. The learned Judge considered that there was a distinction between that case and the Calcutta case which has just been quoted, but we are unable to see any distinction in the principle involved.

The facts in *Fallesatha Banu* v. *Mohamed Rashiuddin Quraishi*[1], bear no analogy to the facts in *Ramcharan Chakrabarthy* v. *Nimai Mandal*[2], or in *Mohamed Yusuf* v. *Narayana Pillai*[3]. In *Fallesatha Banu* v. *Mohamed Rashiuddin Quraishi*[1], the Court held that unless interest is received as such S. 20 of the Limitation Act cannot extend the period of limitation in favour of the plaintiff, but the Court was not considering the position of a mortgagee, who has gone into possession as owner under an invalid title, and we do not regard the case as having any real bearing here.

In the present case the plaintiff had a valid mortgage, but went into possession of the mortgaged properties under an invalid contract of sale. The fact that his sale proved to be invalid could not vitiate his title as mortgagee and the rents and profits which he received must in the circumstances be deemed to have been received by him as the mortgagee. He may have thought that he was receiving them as the full owner of the property, but as he did not in fact hold that position he could only have received them in the capacity actually held by him, namely that of mortgagee. Support for this opinion is to be found in the decision of the Privy Council in *Ramcharan Lohia*

1. (1934) 40 L.W. 595.
2. (1921) 35 C.L.J. 58.
3. (1937) 2 M.L.J. 170.

Doraisami Naicken v. Periakaruppan Chettiar.

v. *Bhagwan Das Maheshri*[1]. There a karta of a joint Hindu family contracted to sell family property in order to discharge a debt due under a simple mortgage. The karta did not convey the property and the purchasers were compelled to institute a suit for specific performance, as the result of which they obtained a conveyance and went into possession a year later. Out of the price payable to the vendor the vendees discharged the mortgage debt. Subsequently, the karta's sons challenged the validity of the transaction and it was held that it did not bind them, but the Privy Council said that the purchasers should for the period in which they were in possession of the property be treated as usufructuary mortgagees. They had discharged the mortgage. They purported to be in possession as purchasers, but as their title was defective they were to be regarded as usufructuary mortgagees. It follows that we consider that in *Ramcharan Chakrabarti* v. *Nimai Mandal*[2], the correct opinion was expressed and therefore the appellant in this case was in possession of the property within the meaning of S. 20 of the Limitation Act.

This Court held in *Subbalakshmi Ammal* v. *Ramanujam Chetti*[3], that an application which amounts to an acknowledgment within the terms of S. 19 of the Limitation Act gives a fresh starting point for computing limitation in an application for a final decree in a mortgage suit. There is no difference in principle between S. 19 and S. 20 and the Allahabad High Court in *Baldeo Sahai* v. *Jafar Husain*[4], expressly held that S. 20 operates to extend the time for the filing of an application for a final decree. It has been suggested that the decision of this Court in *Singa Raja* v. *Pethu Raja*[5], is in conflict but we do not agree. The Court there was not considering the question which arises here.

We hold that in the circumstances of this case the appellant must be deemed to have been in possession of the properties in suit as the mortgagee and therefore S. 20 (2) of the Limitation Act applies which means that his application for a final decree on the 27th October, 1937, was in time. In these circumstances it is not necessary to consider the appellant's second contention.

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1. (1926) I.L.R. 48 All 443.
2. (1921) 35 C.L.J. 58.
3. (1918) I.L.R. 42 Mad 52: 35 M.L.J. 552.
4. (1926) I.L.R. 49 All. 147.
5. (1918) I.L.R. 42 Mad. 61: 35 M.L.J. 579.

The appeal succeeds and will be allowed with costs in this Court and before Patanjali Sastri, J. Doraisami Naicken v. Periakaruppan Chettiar.

K.S. — *Appeal allowed.*

PRIVY COUNCIL.

On appeal from the High Court of Judicature at Madras.

PRESENT:—VISCOUNT MAUGHAM, LORD RUSSELL OF KILLOWEN, LORD WRIGHT, SIR GEORGE RANKIN, MR. M. R. JAYAKAR.

O. Rm. O. M. Sp. (Firm) .. *Appellant.

v.

P. L. N. K. M. Nagappa Chettiar and another .. *Repondents.*

Limitation Act (IX of 1908), Arts. 36, 120—Trusts—Trust fund paid with authority to payee to invest in his own business—Discharge by payee of overdraft with fund—Legality—Limitation on runs from date of plaintiff's acquiring knowledge—Procedure—Consent of Advocate-General to action—Not necessary in recovering trust property in hands of stranger to trust—Civil Procedure Code (V of 1908), S. 92. P.C. O. Rm. O. M. Sp. (Firm) v. Nagappa Chettiar.

The decisions in India have established a rule of limitation under Art. 120 by which the plaintiff in cases to which the rule applies cannot be debarred of his remedy unless with knowledge of his rights he has been guilty of delay.

Therefore where an action is brought on the ground of fraud, misconduct or mistake on the part of the defendant, the right to sue is deemed to accrue under that article at the time when the plaintiff comes to know of the fraud, misconduct or mistake in question and time will begin to run against him only from the date of knowledge.

Art. 120 and the above principle and not Art. 36 *Held* to apply also to an action against a bank, where the plaintiff paid to his uncle for the conduct of certain charities moneys which were credited to the account of those charities with the defendant bank and where the bank subsequently transferred those moneys to the uncle's account in discharge of latter's overdraft with them.

Held further, that the discharge by a person of his overdraft by transferring trust moneys to his own account did not come within the scope or intention of the authority given by the person providing those trust moneys to the recipient to "invest the trust funds in his own business". The consent of the Advocate-General under S. 92 of the Civil Procedure Code is not necessary to the bringing of an action to recover trust property in the hands of a stranger to the trust.

Decision of the Madras High Court reported in (1939) 1 M.L.J. 625, affirmed.

Venkateswara Aiyar v. *Somasundaram Chettiar,* (1918) 44 I.C. 551, *Peruri Viswanadham* v. *Pendala Narayana Das,* A.I.R. 1928 Nag. 837, *Lal Singh* v. *Jai Chand,* (1930) I.L.R. 12 Lah. 262, *Mathura Singh* v. *Ramarudra Prasad,* (1935) I.L.R. 14 Pat. 824 and *M. Basaveyya* v. *Majeti Bapana,* A.I.R. 1930 Mad. 173 approved.

* P. C. A. No. 67 of 1939. 17th September, 1940.

P.C.

O. Rm. O. M. Sp. (Firm) v. Nagappa Chettiar.

Appeal from a decree of the High Court, Madras, dated May 9, 1938 in its appellate jurisdiction (Leach, C. J. and Krishnaswami Ayyangar, J.)* reversing a decree dated March, 27, 1936 of that Court in its Original Civil Jurisdiction (Lakshmana Rao, J.).

The plaintiff Nagappa and his minor brother were with their uncle Subrahmanyam, members of a joint Hindu family. After the death of Nagappa's father in 1914 a partition of the assets of the family business was effected, the main term of the partition agreement being that the uncle should take over the whole of the business. The plaintiff's father had been interested in two religious charities and before the partition a certain sum had been credited to one of the charities in the books of the business. The partition agreement provided that the two branches of the family should furnish a capital of Rs. 10,000, for each of the charities. The plaintiff accordingly drew and gave to his uncle two hundies dated 1st December, 1916 for the sums which he had agreed to find. The hundies were drawn on the plaintiff's account with the defendants, a firm of bankers. They were made payable to bearer but each was headed with the name of the charity concerned under the word "credit". The defendants, when the uncle presented the hundies, credited them in each case to an account in the name of the charity concerned. The sums remained to the credit of the accounts of the charity until 10th February, 1920 on which date they were transferred to the uncle's account with the defendants and the two accounts of the charities were closed, the result of the transaction being that the uncle's overdraft with the defendants was cancelled. The plaintiff accordingly brought this action to compel the defendants to refund to the charities the sums so received by them in reduction of the uncle's overdraft, contending that that application of the money constituted a breach of trust by the uncle of which the defendants had notice and by which they profited. The trial Judge dismissed the action. That decision was reversed on appeal. The defendants had appealed to His Majesty. The facts are set out in detail in the judgment.

Sir Herbert Cunliffe, K. C., and Wallach for Appellant.—To deal with the case first on its merits: it is submitted that the handing over by the plaintiff to Subrahmanyam of the two hundies constituted an investment of the sums which they represented in the latter's business. The heading "credit charity so and so" was no more than an indication of which of the several accounts which Subrahmanyam kept with the defendants was to receive the money. Subrahmanyam having authority to invest moneys in his

* (1939) 1 M.L.J. 625.

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O. Rm. O. M. Sp. (Firm) v. Nagappa Chettiar.

own business in fact followed the course for some time of leaving them with the defendant bank to earn interest. The ultimate transfer of the moneys to his own account by Subrahmanyam was no breach of trust. In any case the plaintiff only proceeded against the present defendants after his failure to recover against Subrahmanyam in the latter's insolvency. The former proceedings were on the same facts as the present—while they do not operate as *res judicata* against these proceedings it is not without relevance to call attention to them here. (Counsel referred to Ss. 40 and 42 of the Indian Evidence Act). The bank's exact position in relation to the transfer of February, 1920 needs consideration. First, it is submitted it is not material that the bank had notice of the trust that is, knew that the moneys were trust funds. Next it is to be observed that the bank did not act on its own initiative in a matter like this. It acted under the orders of Subrahmanyam, orders which it was not entitled to refuse to obey.

If, as appears to have been admitted in the Court below, Subrahmanyam was given control over the moneys with power to invest them in his own business, the paying in of the moneys by Subrahmanyam to the account with the defendant bank was such an investment. The transaction of 1920 was no more than a re-investment of the moneys and the bank consequently in our submission could have committed no breach of trust in effecting the transfer as it did. More than that, the bank had actually no power to refuse to obey Subrahmanyam's instructions: See *Gray* v. *Johnston*[1]. (Counsel also referred to *Coleman* v. *Bucks and Oxon Union Bank*[2]).

In any case what was there in this very common transaction to lead the bank to suspect that any breach of trust might be constituted by it? The plaintiff has in any case been admitted a creditor in Subrahmanyam's insolvency and the bank are entitled to set off in respect of whatever he recovers in that insolvency. Moreover there should be a deduction in respect of moneys spent by Subrahmanyam on the charities during the many years for which he carried them on without complaint. (Counsel also referred to Civil Procedure Code, O. 31, r. 2 in support of a submission that the action was imperfect in that all the trustees were not before the Court).

Wallach following.—Let it be assumed, first, that Art. 120 of the Limitation Act applies to this case. Time must have begun to run against the plaintiff either on 10th February, 1920 when the money was withdrawn and used to cancel Subrahmanyam's over-

1. (1868) L.R. 3 H.L. 1. 2. (1897) 2 Ch. D. 243.

P.C.
O. Rm. O. M. Sp. (Firm) v. Nagappa Chettiar.

draft or in 1924 when the plaintiff received notice of the withdrawal. At one or other of those times his cause of action arose. The general remarks made in *Bolo* v. *Koklan*[1], are not applicable because the facts in that case are so very different.

(*Viscount Maugham.*—But the expression "When the right to sue accrues" implies necessarily that the plaintiff should know that he has a cause of action, does it not?).

Counsel referred to S. 18 of the Act and to the following cases. *Annamalai Chettiar* v. *A. M. K. C. T. Muthukaruppan Chettiar*[2], *Subbiah Thevar* v. *Samiappa Mudaliar*[3], *Lal Singh* v. *Jai Chand*[4], *Mathura Singh* v. *Ram Rudra Prasad*[5], *Peruru Viswanadhan* v. *Pendala Narayana Das*[6], *Othapurakkal Thakate Soopi* v. *Cherichil Pallikal Uppathumma*[7], and *Venkatachala Reddiar* v. *Collector of Trichinopoly*[8].

(*Lord Russell of Killowen.*—But how can the plaintiff be said to have had the necessary knowledge before 1929?).

He knew in 1924 that the account in which the trust moneys stood had been closed. All that he did not know was the nature of the transaction—namely, that no money had passed. But it was open to him in 1924, to take proceedings.

But it is submitted, it is not Art. 120 but Art. 36. "For compensation for any malfeasance, misfeasance or non-feasance, independent of contract......" which applies to this case. For that article the period of limitation is only two years so that the suit is clearly barred. Finally it is submitted this suit is incompetent because it was instituted without the consent of the Advocate-General under S. 92 of the Code of Civil Procedure.

There was no appearance by or for the plaintiff-respondent.

Their Lordships' Judgment was delivered by

Sir George Rankin.

SIR GEORGE RANKIN.—This appeal arises out of a suit filed on the Original Side of the High Court at Madras on 29th April, 1933, and is brought from the decree of an Appellate Bench dated 9th May, 1938, reversing a decision of Lakshmana Rao, J., dated 27th March, 1936, whereby the suit had been dismissed. All the parties to the suit are Nattukottai Chettiars. The appellant is a firm which is known by the letters O. RM. O. M. SP., and which carries on business at Madras as bankers and moneylenders. It was the first defendant to the suit and it will be conveniently referred to as the appellant

1. (1930) L.R 57 I.A. 325.
2. (1930) L.R. 58 I.A. 1.
3. I.L.R. 1938 Mad. 586.
4. (1930) I.L.R. 12 Lah. 262.
5. (1935) I.L.R. 14 Pat. 824 at p. 847.
6. A.I.R. 1938 Mad. 837.
7. (1909) I.L.R. 33 Mad. 31.
8. (1914) I.L.R. 38 Mad. 1064.

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bank. The plaintiff Nagappa and his younger brother Lakshmanan were the sons of one Minakshisundaram, whose brother Subrahmanyam, though not an original defendant, was added as the second defendant to the suit by an order dated 24th January, 1934. They were members of a joint Hindu family and had a family business in "piece-goods" (cloth) at Madras and other places—the plaintiff's father's share being 10 annas and Subrahmanyam's 6 annas. After the death of the plaintiff's father in 1914 a partition of the assets of business was effected with the aid of certain business friends and the terms of this arrangement were embodied in a *yadast* or note dated 17th January, 1916, which the plaintiff signed on behalf of himself and his brother, who was then a minor. The main term was that the business should be taken over in its entirety by Subrahmanyam. It appears that the plaintiff's father had been interested in two religious charities, one for the supply of water to worshippers at a certain place in the hills, and one for the supply of cloth for the purposes of a temple. Before the partition a sum of Rs. 2,000 had been credited in the books of the business to the temple and it was arranged at the time of the partition that the two branches of the family should provide in all a capital of Rs. 10,000 for each of these two charities. The shares in which they were to provide the money were five-eighths and three-eighths—*i.e.*, 10 annas and 6 annas, according to their shares in the business. As Rs. 2,000 had already been provided for the temple, the plaintiff's branch had to find Rs. 5,000 for that and Rs. 6,250 for the water charity. The *yadast* by Cl. 13 thereof provided that both branches of the family should manage and conduct the charities. Acting upon this arrangement the plaintiff drew and handed to his uncle, Subrahmanyam, two hundis, each dated 1st December, 1916, for the money which his branch had agreed to find—that is, for Rs, 5,000 and Rs. 6,250 respectively with interest at the Madras *nadappu* rate from 17th January, 1916, the date of the *yadast*. The plaintiff had a banking account with the appellant firm and the hundis were drawn on that firm. Though made payable to bearer they were headed with the name of the charity concerned under the word "credit"—that is, showing the charity as the party or account in whose favour they were intended. It is not necessary that the terms of the hundis should be here set out.

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They were taken by Subrahmanyam to the appellant bank and on 11th September, 1917, the bank endorsed each with a statement that the amount with interest to date had been received. It is admitted that the bank credited these sums in each case to an account in the name of the charity concerned, though Subrahmanyam had had an account with the appellant bank since 6th January, 1917. The monies remained at the credit of the charities with the appellant firm until the 10th February, 1920, by which time they amounted in all to Rs. 15,732-15-9. On that date they were transferred to the credit of Subrahmanyam's account and the accounts in the name of the charities were closed. The transaction is clearly and simply described in the Case of the appellant bank as follows:—A book entry of Rs. 15,70 was made in favour of the appellant bank thereby cancelling an overdraft of Subrahmanyam in the books of the appellant bank and the balance of Rs. 32-15-9 was paid to Subrahmanyam in cash. At the same time Subrahmanyam in his own books in his moneylending business opened new accounts in the names of the two charities—that is, Rs. 8,740-8-9 in favour of one and Rs. 6,992-7-0 in favour of the other charity.

To challenge this transaction is the purpose of the present suit. The plaintiff seeks to make the appellant bank liable to refund to the charities the money received by it in reduction of Subrahmanyam's overdraft on the footing that this application of the money was a breach of trust on the part of Subrahmanyam of which the appellant bank had notice and by which the appellant bank has profited.

Some evidence was given by a witness on behalf of the appellant bank to the effect that when Subrahmanyam first handed over the hundis and opened the two accounts in the name of the charities he had intimated "I shall take it whenever I want". Their Lordships regard this evidence as unreliable. The witness also deposed that at the time of the transfer of the monies on 10th February, 1920, cash was actually borrowed from Marwaris, was paid to one Chidambaram on behalf of Subrahmanyam, repaid to the bank by him and repaid to the Marwaris by the bank on the same day. Their Lordships regard these statements as untrue and they are here mentioned only to be put aside.

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Admittedly, the substantial effect of the transaction of 10th February, 1920, was to empty the charity accounts and to cancel Subrahmanyam's overdraft. Though a Hindu religious endowment is not technically for all purposes in the same position as an English trust and its property is not vested in its manager as trust property is vested in a trustee, such differences are of small importance for the purposes of the present case. *Gray* v. *Johnston*[1] and *Coleman* v. *Bucks & Oxon Union Bank*[2] were cited at the bar, but their Lordships do not consider that an examination of the case law is required to show that the appellant bank in appropriating the charity moneys to itself was taking a transfer of property which in equity it would be bound to restore to the charities unless it could show that Subrahmanyam had authority to use these funds to pay off his overdraft. In that event no doubt the transfer which seemed on its face to be highly improper would turn out to be justified. Their Lordships will assume that if the transfer was within Subrahmanyam's authority, the appellant bank would not be liable to restore the money by reason merely that Subrahmanyam in exercising his authority had failed to pay due regard to the interests of the charities. But the appellant bank on the facts of this case is without defence upon the merits unless it first establishes that the transfer was within the authority of Subrahmanyam and not a breach of trust by him. It avails nothing to dispute whether the transfer was due more to Subrahmanyam's desire to put his account in credit or to the bank's desire to be repaid.

It is said that Subrahmanyam had received from the plaintiff authority to do what he did. Upon this question and upon the question of limitation—in their Lordships' opinion the only substantial questions in this case—it is necessary to notice some events which took place after the transfer had been made. Subrahmanyam's account with the appellant bank is in evidence and while it shows a credit balance of Rs. 4,500 in May, 1920, it continues thereafter to be in debit, the balances as struck rising in 1920 to Rs. 60,000, in April, 1921, to Rs. 1,12,680 and continuing throughout the rest of that year in the neighbourhood of half a lac. In 1924 the charities were no longer being kept up and before the end of 1925 an insolvency petition was

1. (1868) L.R. 3 H. L. 1.
2. (1897) L.R. 2 Ch. D. 243.

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presented in the High Court which resulted in Subrahmanyam being adjudicated insolvent on 4th January, 1926. It appears that he had engaged in speculative purchases of immoveable property involving considerable sums.

In 1924 the plaintiff came to know that the funds were no longer in deposit with the appellant bank and on 1st March of that year a letter written on the plaintiff's behalf by an advocate claimed from Subrahmanyam the amount of the hundis with interest as having been deposited by the plaintiff and his younger brother in Subrahmanyam's firm for the purposes of the charities at the *nadappu* rate of interest. This allegation was repeated incidentally in a plaint dated 25th April, 1924 (C. S. No. 328 of 1924) filed in the Madras High Court with reference to Subrahmanyam's collections from the branches of the joint family business which had been partitioned by the *yadast* of 17th January, 1916. Again in 1929 the plaintiff took steps in the insolvency to have it declared that the monies now in question did not pass to the Official Assignee as part of the estate of Subrahmanyam but were trust monies. He brought a motion to obtain a declaration to that effect on the footing that Subrahmanyam had withdrawn the monies from the appellant bank and it is clear enough that this proceeding was taken and maintained upon the basis that Subrahmanyam had been authorised to withdraw them. The motion failed on the ground (*inter alia*) that there were no assets left at the time of the insolvency which could be traced to the monies which had been withdrawn from the appellant bank. It is stated in the judgment of the learned Chief Justice in the present case that the plaintiff came to know in 1929 of the fact that the monies were not really withdrawn from the appellant bank in 1920 but were taken by the appellant bank in cancellation of Subrahmanyam's overdraft so that the funds had disappeared altogether.

The case made by the plaintiff in his pleading and by his own evidence in the present suit was different from his previous statements. It was to the effect that at the time the charitable funds were constituted in 1916 it was agreed that they should be invested with a third party and not with Subrahmanyam; and that Subrahmanyam should not vary the investment without the plaintiff's consent. The learned trial Judge in view of the

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etter of 1st March, 1924, which the plaintiff endeavoured to repudiate as a misinterpretation of his instructions to his advocate, disbelieved this part of the plaintiff's evidence and came to the following conclusion:—

"Under the circumstances it cannot reasonably be doubted that (Subrahmanyam) was authorised to invest the trust funds in his own business in consideration of his paying *nadappu* interest and the amount in question was on the same day—*i.e.*, 10th February, 1920, credited by him in the accounts of the *dharmams* in his books. The result of the transaction on either supposition would be to transfer the trust money to the business of (Subrahmanyam) and he was acting within his rights in doing so".

The finding of fact as to the authority given to Subrahmanyam, contrary though it was to the plaintiff's evidence, was not contested before the learned Chief Justice and Krishnaswami Ayyangar, J., on appeal. The Chief Justice states:

"The trust funds were created and it is admitted that the second respondent (Subrahmanyam) being the uncle of the appellant (plaintiff) and much older was given the management of them. It is also admitted that the second respondent (Subrahmanyam) was given the right of investing the trust funds in his own business if he so decided".

But the Appellate Bench did not consider that Subrahmanyam had acted within his authority:—

"There could be no investment of the trust monies in (Subrahmanyam's) business unless they were replaced. They were not replaced and therefore there was no investment. The first respondent (that is the appellant bank) was not entitled to do what he did without being satisfied that the entries in (Subrahmanyam's) books were going to be supported by cash. He took no steps to satisfy himself that this would be done. On the other hand he applied the trust monies for his own benefit knowing full well that (Subrahmanyam) was merely intending to constitute himself a debtor to the trusts".

"To invest the trust funds in his own business" is a phrase which stands in need of some interpretation and it is possible that the trial Judge may have taken it too broadly and that the Appellate Bench may have taken it too narrowly. The burden of proving the nature and extent of the authority is on the appellant bank and the fact that the plaintiff's evidence was not believed does not necessarily imply that the statements previously made by him in the letter of 1st March, 1924, the suit of 1924 and the insolvency proceedings of 1929 can be accepted. Subrahmanyam was not called nor was his absence from the witness-box explained. The result is that there is no direct and reliable evidence as to what was said by the plaintiff or his uncle on the subject of investment. It is to be inferred that the authority relied upon is an authority given by the plaintiff at the time of handing over the hundis in 1916 or

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1917—while he still bore the character of settlor and the endowment was not yet perfected. The trusts having arisen in connection with the family piece-goods business, it is not very difficult to suppose that Subrahmanyam who was to carry it on after the partition might be authorised to use the money in that business. It is a common practice among Chettiars to carry sums in their books to the credit of a charity without intending that the money should be set apart or taken out of the business. The present was a case in which the money was the money of the plaintiff and his brother and the business was to be their uncle's, but this may not have been regarded as calling for a stricter system. Any wider authority to deal with the monies, even if alleged to have been given to the uncle, must, however, be established by the strictest proof. To arrive at a correct interpretation of the arrangement made, and to ascertain whether it covered what was done by Subrahmanyam in February, 1920, it is important to know what businesses he was engaged in at the time of the arrangement and to ascertain the character of the account into which the money went. In addition to continuing the piece-goods business and collecting the assets of certain shops which are mentioned in the *yadast*, Subrahmanyam seems in 1917 to have done business of some sort at Penang. Whether his speculations in immoveable property had then begun it is not possible on the evidence to ascertain, though it appears in evidence that one large transaction of this character took place in May, 1920. An account with the appellant bank called the "go-down" account was opened by Subrahmanyam in January, 1917, and would appear to have had reference to the piece-goods business. At some date before March, 1918, he began a moneylending business in Coral Merchant Street and in that month an account was opened with the appellant bank called the account of the "street shop" in connection with this business. The "go-down" account was closed in April, 1919, by a transfer to the "street shop" account of Rs. 4,401. From that date the latter account can only be described as Subrahmanyam's "private account" to use the words of the Chief Justice, or as the appellant bank's written statement calls it "his personal ledger in the defendant firm". It is this account which was overdrawn in February, 1920, and into which the charity money was paid, and it was in the books of the moneylending business or "street shop" that Subrahmanyam made credit

entries in favour of the charities and debited the bank's account. What other books of account were kept by him does not appear. It is not possible on the evidence to ascertain that the overdraft outstanding on 10th February, 1920, had been incurred on account of the piece-goods business or the moneylending business or any other business in particular: still less can it be said that any particular business got the benefit of the charity money. Unless it can be held that the plaintiff at the time of handing over the hundis authorised his uncle to borrow the money and use it as he chose—whether for buying property, lending money, dealing in piece-goods or any other business purpose, the appellant bank has not shown the authority of Subrahmanyam to make the transfer of the 10th February, 1920. The learned Chief Justice may have gone too far if his language was intended to exclude all possibility of investing money in a business by paying off a liability of the business. It would not be impossible to put a case in which a business in need of new stock or having occasion to acquire new premises paid for its requirements in the first instance by means of an overdraft. In such a case, a stranger finding money to discharge the overdraft might without difficulty be said to be investing money in the business. Their Lordships are not construing a document or even arriving at the terms of an oral bargain spoken to by reliable witnesses but are in the position of arriving at the facts of the case in the light of an admission made in the appellate Court; and they find it impossible to be satisfied that the discharge of an overdraft on this particular account comes within the scope or intention of any authority given by the plaintiff "to invest the trust funds in his own business". The disappearance of the money into this account would not among ordinary business men be deemed an "investment" of the money and the appellant bank has not succeeded in showing that Subrahmanyam in February, 1920, acted within any authority given to him when the hundis were handed over.

The question of limitation has next to be considered. The claim against the appellant bank is not that a breach of trust was committed by it but that it took the trust property by a transaction with Subrahmanyam which was a breach of trust on his part and with notice that it was a breach of trust. Their Lordships are of opinion that Art. 36 of the Limitation Act does not apply to the case and that it comes under Art. 120

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which prescribes a period of six years from the time "when the right to sue accrues". The question is whether time began to run from 10th February, 1920, or from the date in 1929 when the plaintiff came to know that the money of the charities was set off against Subrahmanyam's debt to the appellant bank upon his overdraft. The suit having being brought in 1933 it is necessary for the plaintiff to be able to calculate the time from the later date. The language of Art. 120 makes no reference to the knowledge of the plaintiff and is in this respect in contrast with that of other articles, *e.g.*, 90, 91, 92, 95, 96, 114. On the other hand it was recognised by the Board in *Musammat Bolo* v. *Musammat Koklan*[1], that an infringement of the plaintiff's right or at least a clear and unequivocal threat to infringe it is necessary before time begins to run against the plaintiff under the article. The Appellate Bench acted upon a principle which has been accepted as applicable to this article in a number of cases in several of the High Courts: *Venkateswara Aiyar* v. *Somasundaram Chettiar*[2], *Peruri Viswanadham* v. *Pendela Narayana Das*[3], *Lal Singh* v. *Jai Chand*[4], *Mathura Singh* v. *Rama Rudra Prasad*[5], *M. Basvayya* v. *Majeti Bapana*[6]. In the last-mentioned case it was said that in cases in which the relief is sought on the ground of fraud, misconduct, mistake, etc., it would appear that limitation is made to commence from the time when the fraud, misconduct or mistake becomes known to the plaintiff. Such articles as 90, 91, 92, 95 and 96 were mentioned by way of illustration of this principle, and it was considered that Art. 120 being an omnibus one the general expression employed in column 3 is necessitated by the variety of suits coming within its purview, in some only of which would fraud, misconduct or mistake be part of the cause of action. It was accordingly held that it would be in consonance with the scheme of the Act if the right to sue should be deemed to accrue under Art. 120 from the time of the plaintiff's knowledge of the fraud, misconduct or mistake where such a ground was the basis of the suit. Their Lordships can see some difficulties in this reasoning as a matter of interpretation of the language of the statute and had the matter

1 (1930) L.R. 57 I.A. 325: 59 M.L.J. 621: I.L.R. 11 Lah. 657 (P.C.).
2. (1918) 44 Ind. Cas. 551. 3. A.I.R. (1928) Mad. 837.
4. (1930) I.L.R. 12 Lah. 262. 5. (1935) I.L.R. 14 Pat. 824.
6. A.I.R. 1930 Mad. 173: 58 M.L.J. 349.

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been *res integra* they are not certain that this interpretation would have prevailed with them. But the decisions in India have established a rule of limitation under Art. 120 by which the plaintiff in the cases to which the rule applies cannot be debarred of his remedy unless with knowledge of his rights he has been guilty of delay. The decisions which have been referred to were given in cases where the plaintiff sought to set aside a decree passed against him when a minor owing to the negligence of his guardian, or a mortgage of property which belonged not to the mortgagor but to a temple, or a transfer by a debtor to defeat his creditors. The subject-matter of the present suit is somewhat different but their Lordships are prepared to follow the principle of the Indian decisions in the present case and to hold that the suit is within time.

It was suggested in the course of argument that the suit should only have been brought with the consent of the Advocate-General under S. 92 of the Code of Civil Procedure but their Lordships think it clear that no such consent is necessary in order that a trustee may recover trust property in the hands of a stranger to the trust. It was also contended that an account should have been taken as to the monies expended by Subrahmanyam upon the charities up to the year 1924 after which he seems to have neglected them; but as no such point appears to have been taken in the High Court their Lordships do not think right to direct any such account. They will humbly advise His Majesty that the appeal should be dismissed. The first respondent entered an appearance but no case was lodged for any of the respondents. The first respondent will get from the appellant firm such costs as he has incurred.

Solicitors for Appellants: *Messrs. Hy. S. L. Polak & Co.*

Solicitors for Respondent No. 1: *Messrs. T. L. Wilson & Co.*

R. C. C. *Appeal dismissed.*

K. S.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PATANJALI SASTRI.

Guruvayya v. Official Receiver, Guntur.

Jooluri Guruvayya .. *Petitioner** (*Plaintiff-Decree-holder*)

v.

The Official Receiver, Guntur. *Respondent* (*Appellant*).

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* C.R.P. No. 1133 of 1939, 30th August, 1940.

Guruvayya v. Official Receiver, Guntur.

Provincial Insolvency Act (V of 1920), S. 28 (7) and 51 (1)—"Relation back" of order of adjudication to date of presentation of petition—Effect on rights of creditor to amounts realised in execution between the two dates.

Before an insolvency petition was admitted the judgment-debtors' properties were sold in execution of a decree and an amount was realised. The Official Receiver claimed the amount on the ground that the order of adjudication should be regarded as taking effect from the date of the presentation of the insolvency petition.

Held, that S. 28 (2) of the Provincial Insolvency Act excepts from its operation the other provisions of the Act including S. 51 and consequently the Official Receiver's title to the property of the insolvent does not extend to the assests realised in the course of execution levied against the property of the insolvent before the date of the admission of the insolvency petition.

Charanjit Singh v. *Sardar Mohammad*, A.I.R. 1935 Lah. 690, approved.

Petition under S. 25 of Act IX of 1887 praying that the High Court will be pleased to revise the order of the Court of the Subordinate Judge of Guntur dated 3rd March, 1939, and made on Application by the Official Receiver, Guntur in S. C. S. No. 440 of 1933.

N. Vasudeva Rao for Petitioner.

Respondent not represented.

The Court delivered the following

JUDGMENT.—The petitioner obtained a decree against certain persons who were subsequently adjudicated insolvents. Before the insolvency petition was admitted, the judgment-debtors' properties were sold in execution of the decree and a sum of about Rs. 666 was realised. The respondent who is the Official Receiver applied to the Court below for payment of this amount to him and the Court ordered payment accordingly.

The petitioner assails the validity of this order as being contrary to S. 51 (1) of the Provincial Insolvency Act. *Prima facie* that section entitles the petitioner to the amount realised in execution of his decree, as it does not appear that the petitioner's allegation in the counter petition filed in the lower court that the amount was realised before the admission of the insolvency petition was controverted. But the respondent's contention which has found favour with the Court below is that by virtue of S. 28 (7), the order of adjudication should be regarded as taking effect from the date of the presentation of the insolvency petition and that therefore the respondent's title to that sum should prevail.

No direct decision of this Court dealing with this point has been brought to my notice and it has to be decided with

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reference to the relevant provisions of the Act. It is true that there are no words in S. 28 (7) making the operation of that provision subject to the other provisions of the Act, but the Official Receiver's title to the property of the insolvent as on the date of the presentation of the insolvency petition rests on the combined operation of the provisions of S. 28 (2) and (7), and sub-S. (2) excepts from its operation the other provisions of the Act including S. 51. It is therefore quite clear that the Official Receiver's title to the property of the insolvent does not extend to the assets realised, in the course of execution levied against the property of the insolvent before the date of the admission of the insolvency petition. To hold otherwise would be to nullify the provisions of S. 51. The Lahore High Court has taken the same view in *Charanjit Singh* v. *Sardar Mohammad*[1].

The Civil Revision Petition is allowed with costs here and below.

K. S. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KING.

Bijjala Pedda Bali Reddi .. *Appellant** (*Respondent*)

v.

Bathula Chinna Nagi Reddi and others. *Respondents* (*Petitioners*).

Bali Reddi v. Nagi Reddi

Civil Procedure Code (*V of* 1908), *S.* 151—*Order under to make restitution—Appealability.*

If a party is ordered under S. 151 of the Code of Civil Procedure to make restitution he will have a right of appeal from such order.

Ayyasami Aiyar v. *Sivakki Ammal*, (1932) 65 M.L.J. 407: I.L.R. 56 Mad. 909, applied.

Appeal against the order of the Court of the Subordinate Judge of Kurnool dated 8th February, 1939 and passed in A.S. No. 116 of 1938 (A. S. No. 56 of 1938, District Court) preferred against the order of the Court of the District Munsif of Nandyal dated 21st March, 1938 and made in I. A. No. 512 of 1932 in O. S. No. 1382 of 1930.

A. C. Sampath Aiyangar for Appellant.

M. S. Ramachandra Rao for Respondent.

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1. A.I.R. 1935 Lah. 690.

* C.M.S.A. No. 57 of 1939. 9th September, 1940.

Bali Reddi v. Nagi Reddi.

The Court delivered the following

JUDGMENT.—It is argued in second appeal that no appea lay to the first appellate Court. For this argument authority can no doubt be cited, Lahore and Patna, but in Madras I am bound by *Ayyasami Aiyar* v. *Sivakki Ammal*[1]. This authority lays it down that when a Court calls upon a surety to carry out the terms of his bond—and does so not under the strict terms of S. 145, Civil Procedure Code, but under the inherent powers given it by S. 151, Civil Procedure Code, the right of appeal which the surety would have had under S. 145 is not lost to him under S. 151. The same principle clearly applies to an order under S. 151 read with S. 144. If a party is ordered under S. 151 to make restitution he must have a right of appeal. That the proceedings in the present case were analogous to proceedings under S. 144 cannot be doubted. The appeal to the first appellate Court was therefore competent. The first appellate Court reversed the Court of First Instance on questions of fact which cannot now be challenged. This appeal accordingly fails and is dismissed with costs.

K. S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, AND MR. JUSTICE KRISHNASWAMI AIYANGAR.

Nanjappa Chetty .. *Appellant** (*Appellant—Plaintiff*).

v.

Perumal Chettiar and others .. *Respondents* (*Respondents—Defendants 2 to 4.*)

Nanjappa Chetty v. Perumal Chettiar.

Land Acquisition Act, S. 30—Dispute as to title between N *and* P—*Reference under S. 30, by Collector, to District Judge—Decision of the District Judge in favour of of* P—N *ex parte—Later suit by* N *to set aside rent sale in favour of* P—*The claim barred by* res judicata.

A decision by a District Judge on a reference to him under S. 30 of the Land Acquisition Act on the question of title to the acquired land is a decision of a competent Court and operates as *res judicata* in a subsequent civil suit.

Where a holding of *N* wa sold under the provisions of S. 112 of the Madras Estates Land Act and purchased by *P's* predecessor-in-title and subsequently the Government acquired a portion of the holding under the Land Acquisition Act and *N* and *P* each claimed the compensation

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1. (1932) I.L.R. 56 Mad. 909: 63 M.L.J. 407.

* L.P.A. No. 3 of 1940. 14th November, 1940.

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amount, a decision by the District Judge on a reference to him that P is the owner and entitled to it operates as *res judicata* and it is not open to N to raise the question of title later in a suit to set aside the sale as void for want of notice to him, though N was *ex parte* before the District Judge.

Appeal under Cl. 15 of the Letters Patent from the judgment of the Hon'ble Mr. Justice Patanjali Sastri dated 10th October, 1939 and passed in S. A. No. 45 of 1938 preferred to the High Court against the decree of the District Court of Salem in A. S. No. 33 of 1935 preferred against the decree of the Court of the Subordinate Judge of Salem in O. S. No. 65 of 1931.

D. Ramaswami Aiyangar for Appellant.

T. M. Krishnaswami Aiyar and *M. Sundaram Aiyar* for Respondents.

The judgment of the Court was delivered by

Leach, C.J.

The Chief Justice.—This appeal arises out of a suit filed by the appellant in the Court of the Subordinate Judge of Salem. The Subordinate Judge held that the appellant's claim was barred by the doctrine of *res judicata*. This decision was concurred in by the District Judge of Salem to whom the appellant appealed. The appellant then filed a second appeal to this Court. The appeal was heard by Patanjali Sastri, J., who without hesitation agreed with the District Judge. The learned Judge having given a certificate under Cl. 15 of the Letters Patent this Court is called upon to give the question further consideration. We also have no hesitation in rejecting the appeal, and we are bound to say that it is regrettable that this question which presents no difficulty should have occupied so much judicial time and involved the expenditure of so much money.

The facts are these. The appellant, the first respondent and the third respondent are brothers who were joint until 1925. In that year a partition took place and the appellant received as part of his share ·60 of an acre of ryoti land in the Salem District. On the 29th December, 1926 the landholder, who is the second respondent in this appeal, caused the land to be sold for arrears of rent under the provisions of S. 112 of the Madras Estates Land Act, 1908. The property was bought by one Jailabdeen Sahib who was the first defendant in the suit, but is not a party to this appeal. A sale certificate was issued to the purchaser on the 4th March, 1927 and on the 1st July of that year he sold the land to the first

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respondent. Later in the year the Government acquired a portion of the land—·03 of an acre—for the purpose of the construction of a public road. The appellant claimed to be entitled to the compensation money and a similar claim was preferred by the first respondent. The result was that the Land Acquisition Officer referred the dispute for decision to the District Judge of Salem under the provisions of S. 30 of the Land Acquisition Act, 1894. The appellant failed to appear before the District Judge when the case was fixed for decision on the question of title to the land and the District Judge decided that the first respondent was the owner and therefore entitled to the compensation money. The reason which has been given for the non-appearance of the appellant before the District Judge is that he was contemplating filing a suit to set aside the sale of the whole parcel of land by the Revenue Court, but we fail to see what bearing this has on the question which the Court is called upon to decide. On the 20th December, 1929, that is, after the decision of the District Judge, the appellant filed a suit in the Court of the Subordinate Judge of Salem for a declaration that the sale by the Revenue Court for arrears of rent was null and void. The first respondent pleaded *inter alia* that the suit did not lie because the decision of the District Judge in the land acquisition proceedings had finally decided the question. The Subordinate Judge held that the sale was void because notice had not been served on the appellant as required by S. 112 of the Madras Estates Land Act, but he accepted the first respondent's argument that the doctrine of *res judicata* applied, and, as we have indicated, this opinion has been shared by the District Judge and by Patanjali Sastri, J.

The learned Judge relied on the decision of the Privy Council in *Ramachandra Rao* v. *Ramachandra Rao*[1]. In view of that decision which was affirmed by the Judicial Committee in *Bhagwati* v. *Ram Kali*[2], there can be no doubt that the decision of the District Judge must be taken as a decision of a Court of competent jurisdiction, and as it finally decided the question of the title to the land in the land acquisition proceedings it is not open to the appellant to question it here. The appellant had full opportunity to contest the first respondent's title to the land before the District Judge in the case before him under S. 30 of

1. (1922) 43 M.L.J. 78: I.L.R. 45 Mad. 320: L.R. 49 I.A. 129 (P.C.).
2. (1939) 2 M.L.J. 98: L.R. 66 I.A. 145: I.L.R. 1939 All. 460 (P.C.).

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the Land Acquisition Act. If he wished to maintain his claim to the compensation money the proper course was to adduce evidence to prove that the sale was void and therefore the first respondent had obtained no title to the land, but instead of doing this he stood aside and allowed his brother to establish unchallenged the right which he claimed.

For these reasons the appeal will be dismissed with costs in favour of the first respondent.

S.V.V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PATANJALI SASTRI.

The Palghat Electric Corporation Ltd., at Koppam, Palghat .. *Petitioner** (*Defendant*).

v.

T. N. Veeraraghava Aiyar .. *Respondent* (*Plaintiff*).

Palghat Electric Corporation Ltd. v. Veeraraghava Aiyar.

Electricity supply—Rules relating to—Terms and conditions for supply of energy to consumers: Part II r. 1 (e)—"Commercial premises"—Meaning—Premises used as coffee hotel, whether "commercial premises"—Overcharges paid by consumer—Right to recover.

"Commercial premises" means in the context of the classification rules for electric supply by the petitioner-company nothing more than "premises used for purposes of business". The words are not intended to be understood in contradistinction to "trade premises". Accordingly premises used for running a coffee hotel must be regarded as commercial premises for purposes of fixing rates for supply of electric energy.

It is settled law that over-charges made in violation of an obligation imposed upon public utility companies to charge only at certain specified rates are recoverable as "money had and received."

Parker v. The Great Western Railway, Co. (1844) 7 Man & G. 253: 135 E.R. 107, relied on.

Petition under S. 25 of Act IX of 1887 praying that the High Court will be pleased to revise the decree of the Court of the District Munsif of Palghat in S. C. S. No. 921 of 1935.

K. V. Gopalakrishna Nair for Petitioner.

C. K. Viswanatha Aiyar for Respondent.

The Court delivered the following

JUDGMENT.—This is a revision petition preferred by the Palghat Electric Corporation Limited against the decree directing the refund to the respondent, a consumer of electricity in

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*C. R. P. No. 431 of 1937. 15th August, 1940.

Palghat Electric Corporation Ltd. *v.* Veeraraghava Aiyar.

Palghat town, of the over-charge alleged to have been collected from him.

Two contentions have been urged for the petitioner, namely (1) that the premises where the respondent is running a coffee hotel cannot be regarded as 'commercial premises' so as to fall under r. 1, Cl. (*e*) of Part II of the Rules relating to the terms and conditions under which the petitioner-company supplies electric energy in the town of Palghat and (2) that the alleged excess payments made by the respondent to the petitioner-company from 14th February, 1934 till 27th February, 1935 were voluntary payments and therefore are not recoverable.

Learned counsel for the petitioner argued that the term 'commercial premises' must be understood in the light of the well-marked distinction between the terms 'commerce' and 'trade'. 'Commerce' it was said, denotes large scale import and export dealings with foreign countries, while 'trade', signifies mercantile operations on a smaller scale within the country itself. Counsel referred in support of this contention to Wharton's Law Lexicon and Oxford English Dictionary. I am unable to accept this contention. Whatever may be the distinction in meaning between the terms 'commerce' and 'trade', I cannot agree that the term 'commercial premises' used in classifying tenements for purposes of fixing rates for supply of electric energy was intended to be understood in contradistinction to 'trade premises.' I am of opinion that the classification in the Rule is clearly intended to include premises where business such as that of the respondent is carried on. It would indeed be odd if the provision of the cheaper rate of charge were intended for big export and import houses of which there may be few or none in the place which the petitioner's undertaking was intended to serve and not for the benefit of the numerous shops and other business premises which are to be found in the locality. The adjective 'commercial' is commonly used in a wide sense, without any exclusive reference to large scale international operations of export or import. I think therefore that 'commercial premises' means in the context of the classification rules nothing more than premises used for purposes of business.

The second contention of petitioner's learned counsel seems to me to be equally untenable. The correspondence that passed between the company and the respondent (Exs. I, I-a, II and

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II-a) leaves no room for doubt that the respondent claimed from the beginning of the period in question that he should be charged no more than the 'commercial rate' of three annas per unit and was not prepared to pay anything more for the supply of electric energy to his premises. The company replied that the respondent's 'request' was under consideration and it was only in May, 1935, more than a year after the respondent raised the question, that the company definitely informed him that his premises could not be classed as 'commercial premises'. In these circumstances, the higher rate charged and paid in the meantime could only be regarded as payments made under protest and not voluntary payments. The company were admittedly bound by the terms of their undertaking to supply electric energy according to the rates provided for the various classes of premises as classified in these rules, and if the respondent's premises fell within the description of 'commercial premises', he was entitled to claim supply of energy at the favourable rate of three annas per unit and any sum charged in excess must clearly be refunded to him. It is settled law that over-charges made in violation of an obligation imposed upon public utility companies to charge only at certain specified rates are recoverable as 'money had and received'. See *Parker* v. *The Great Western Railway Co.*[1] where it was held that payments "made in order to induce the company (a railway company) to do that which they were bound to do without them" were not voluntary.

The petitioner's counsel relied upon, *Chairman, Municipal Council, Rajahmundry* v. *Subba Rao*[2] which related to payments of profession tax to a Municipal Council. The circumstances in which the payments were made are clearly distinguishable from those of the present case. The decision, therefore, has no application.

The Civil Revision Petition fails and is dismissed with costs.

K. S. *Petition dismissed.*

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1. (1844) 7 Man & G. 253: 135 E.R. 107.
2. (1937) 1 M.L.J. 496.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE MOCKETT AND MR. JUSTICE WADSWORTH.

S. Ramasubba Aiyar and another .. *Petitioners* (Plaintiffs)*

v.

Ayyalu Naidu and another .. *Respondents (Defendants 1 and 2).*

Ramasubba Aiyar v. Ayyalu Naidu.

Court-Fees Act (VII of 1870), S. 7, cl. 4-A—Suit by worshippers for cancellation of decree as not binding upon temple—Trustee of temple charged with collusion in the matter of the decree—Trustee defendant in the representative suit—Court-fees—Test—Substance of prayer.

Where plaintiffs, presumably representing the general body of worshippers, sued for a declaration that a decree obtained against the temple trustee by a grocer, who had supplied goods to the temple was collusive and hence was not binding upon the temple, on the question whether the suit was governed by S. 7, cl. 4-A of the Court-Fees Act,

Held, that in spite of putting both the temple and its present trustee in the array of defendants, the plaintiffs were in substance praying on behalf of the temple for cancellation of a decree obtained against the temple and that as observed in *Chidambaranatha Thambiran* v. *Nallasiva Mudaliar*, (1917) I.L.R. 41 Mad. 124: 33 M.L.J. 357 the plaintiffs, though their position gave them an interest sufficient to justify the filing of a suit independently of the trustee, really sued in the right of the temple and its trustee and hence they should not be permitted to escape from the natural consequences of their suit by arraying the temple and its trustee amongst the defendants. Therefore they should pay a Court-fee under S. 7, cl. 4-A.

Petition under Ss. 115 of Act V of 1908 and 224 of the Government of India Act, praying that the High Court will be pleased to revise the order of the Court of the Subordinate Judge of Mayavaram dated 16th September, 1940 and made on the plaint presented on 7th September, 1940, to the said Court.

V. N. Venkatavaradachariar for Petitioners.

The Government Pleader (B. Sitarama Rao), K. S. Desikan and *S. Sankara Aiyar* for Respondents.

The Court delivered the following

Mockett, J.

JUDGMENTS. *Mockett, J.*—This is a petition seeking to revise an order of the learned Subordinate Judge of Mayavaram and it involves a question under the Court Fees Act. The point may be shortly stated. The petitioners contend that they should pay a Court-fee under Art. 17-A (1) of the Act and the learned Judge has held that the fee should be paid under

* C.R.P. No. 1820 of 1940. 10th January, 1941.

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Mockett, J.

S. 7, cl. 4-A. The history of this matter, so far as it is relevant, is as follows: It appears that one Ayyalu Naidu, a grocer, brought a suit against the temple of Sri Mayuranathaswami Abisheka Kattalai represented by its hereditary trustee Sri la Sri Ambalavana Pandarasannadhi and against Sri la Sri Ambalavana Pandarasannadhi himself. The suit was founded upon a promissory note, and the promissory note had been executed by the trustee in respect of goods supplied by the plaintiff. The end of the suit was that the plaintiff obtained a decree against the temple properties alone and did not press the suit against the trustee against whom the suit was dismissed. The petitioners before us are three worshippers of the temple and they have filed the suit now under consideration in which they impugn the decree passed against the temple shortly on the ground that the trustee was not looking after the temple's interests but allowed the temple to be sacrificed in return for himself being exonerated, and we have to consider exactly what it is that that the plaintiffs have prayed for in this suit. After setting out the facts which I have shortly narrated and alleging collusion between Ayyalu Naidu and the trustee, they finally conclude their plaint with the following prayer:

"The plaintiffs therefore pray that this Honourable Court may be pleased to pass a decree (a) declaring that the decree in O. S. No. 22 of 1937 on the file of this Court is not binding on the second defendant herein (b) directing the first defendant to pay the plaintiffs the costs of this suit and (c) granting the plaintiffs such further or other reliefs etc."

The Subordinate Judge has held that, however worded, this is in substance and in effect a prayer for the cancellation of the decree and that therefore S. 7, cl. 4-A was applicable.

It has been argued before us that that view is wrong because this is a prayer for a decree "declaring that the decree in O.S.No. 22 of 1937 is not binding on the second defendant" and that therefore Art. 17-A (1) is the appropriate article. I have felt some difficultly in approaching this case owing to the position of the petitioners, the plaintiffs in this suit. I find it difficult to understand what their position is. They do not claim any personal benefit. It is not a case of a suit by a worshipper who claims that he has been excluded from his rights as a worshipper. It is not a suit under S. 92 of the Civil Procedure Code, in which a worshipper seeks various remedies that are provided against trustees. It would appear that the position of the plaintiffs can only be regularised by

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leave of the Court under O. 1, r. 8. Before us the petitioners were inclined to concede that they are three of numerous persons and the numerous persons are the worshippers having the same interest in this suit and that they are suing representing all other persons like themselves. Later this aspect may become material in the Court below, but I mention it because there is no doubt whatever and there is ample authority for the position, that in order to decide a matter of Court-fee, the Court is entitled to examine the substance of the suit, and obviously, in order to examine the substance of the suit, the position of the parties thereto, and particularly in this case of the plaintiffs, must necessarily be defined. What is it that the plaintiffs here are seeking to do? They are asking that the decree passed in the previous suit should be declared to be not binding. They have made in this suit both the temple and the trustee himself parties. In my view, the position of the plaintiffs is clear. They have come forward to represent the temple itself. If they seek to sue as individuals only it would seem that an impossible position arises, because there would be nothing to prevent other worshippers coming forward and asking for declarations in other terms. If authority is required for the proposition that the substance of the suit must be regarded, it is to be found in two cases in this High Court—*Arunachalam Chetti* v. *Rangaswami Pillai*[1] and *Ramaswami Aiyangar* v. *Rangachariar*[2]. The learned Counsel for the petitioners has not contended that the substance of the suit is not an extremely relevant consideration. There is another group of cases which assist him in this matter, of which *Manikka Vasaka Desikar* alias *Gnanasambanda Pandara Sannadhi* v. *Balagopalakrishna Chetti*[3], is an example. The effect of this case is that a trustee, who seeks not to be bound by a decree, cannot raise that contention in execution, but must bring a suit to set the decree aside. There is no direct authority on the position before us, but our attention has been drawn to one or two cases. I propose to confine my remarks to the decisions of this High Court, because no decision of any other High Court has rendered me any assistance. *Vallabhacharyulu* v. *Ranagacharyulu*[4], was a suit by reversioners for a declaration that a decree obtained against the widow of the last

1. (1914) 28 M.L.J. 118: I.L.R. 38 Mad. 922 (F.B.).
2. (1940) 1 M.L.J. 32: I.L.R. 1940 Mad. 259 at 277.
3. (1906) 16 M.L.J. 415: I.L.R. 29 Mad. 553.
4. (1936) 45 L.W. 380.

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male holder was collusive and not binding, and in that case a question arose as to whether the decree was governed by S. 7, 4 (*c*) of the Court-Fees. Act or S. 7, 4-A as amended in Madras.

It may be convenient at this stage to set out the articles and sections with which we are concerned. Art. 17-A (1) reads as follows:

"To obtain a declaratory decree where no consequential relief is prayed".

S. 7, 4-A reads:

"In a suit for cancellation of a decree for money or other property having a money value, or other document securing money or other property having such value. . . . ."

Venkataramana Rao, J., in *Vallabhacharyulu* v. *Rangacharyulu*[1], took the view that in cases where the decree does not cast an obligation on persons as parties, though there is a decree on the estate in which they have an interest under the general law, they do not require cancellation but only a declaration that the decree is not binding on their interests. In my view a reversionary suit such as is dealt with by the learned Judge is in a totally different category to suits such as the present where persons come forward, as in this case, and virtually say that, as representing the particular entity—and a temple is an example of an entity that must be represented—they claim to have a decree against it cancelled. That is a very different position from a reversioner who only asks that a decree against the widow should be declared to be invalid. In *Venkatalal* v. *Kosaldasu Bawaji*[2], the plaintiff again had a beneficial interest in the surplus. No case has been cited to us in which the plaintiff who seeks to have a decree declared invalid has had no personal interest whatever in the result.

The learned Government Pleader has put his argument in this manner. He says that the substance of the suit has got to be considered and that this is not a case where the temple was not at all represented in the beginning. He has referred us to several cases of which *Chidambaranatha Thambiran* v. *Nallasiva Mudaliar*[3], which was also cited by the appellants, is an interesting example because that shows that persons in the position of

1. (1936) 45 L.W. 380. 2. (1930) 61 M.L.J. 39.
3. (1917) 33 M.L.J. 357: I.L.R. 41 Mad. 124.

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disciples of a mutt—and it is not unlike the position of worshippers of a temple—come under the category of parties who can sue within the provisions of O. 1, r. 8. Generally, the view I take of this case is that it does not leave much room for any very erudite argument. I think that the test pressed by the learned Government Pleader solves any difficulty. What are the facts? Here, a grocer obtained a decree against a temple and it is alleged—and I emphasise that I am only setting out the pleading—in collusion with the trustee. Unless there is intervention through Court it is obvious that there is nothing to stop that decree being executed. Intervention comes from worshippers and they come forward, in my opinion, not to ask that the decree shall not be binding on the temple, but, as representing the temple, that it should be cancelled, and I find it very difficult to understand how they can be before the Court in any other capacity. That is shortly the basis of the decision of the lower Court and I think that decision is correct. The position of the petitioners under O. 1, r. 8, as I have already indicated, may require a decision later on by the lower Court, and nothing I have said is intended to affect their position except so far as it is relevant to this judgment.

In my view this petition should be dismissed with costs, one set to be divided between the first respondent and the Government Pleader. The original plaint will be returned to the petitioners, who will have two month's time for payment of the court-fee.

Wadsworth, J.

Wadsworth, J.—I agree. I wish to add only a very few words. It seems to me to be well settled that when *A* gets a decree against *B* and *B* or his representative wishes to get rid of that decree *B* must pay court-fee as for the cancellation of the decree, whether he drafts his prayer openly as one for cancellation or whether he disguises it in the form of a prayer for a declaration. If the decree obtained by *A* against *B* adversely affects the interests of *C*, *C* may apply for a declaration that the decree against *B* is not binding upon himself, and in such a suit there is no question of cancellation and the suit can be valued as for a declaration. Here we are concerned with a suit by the plaintiffs, presumably representing the general body of worshippers, for a declaration that the decree obtained by the first defendant against the second defendant, the temple, is not binding upon the temple. The plaintiffs do

Ramasubba Aiyar v. Ayyalu Naidu. — Wadsworth, J.

not ask for the protection of any interest of their own. By the simple device of putting both the temple and its present trustee into the array of defendants they hope to disguise the fact that they are in substance praying on behalf of the temple for the cancellation of a decree obtained against that temple. To my mind, as was observed in *Chidambaranatha Thambiran* v. *Nallasiva Mudaliar*[1], the plaintiffs, though their position gives them an interest sufficient to justify the filing of a suit independently of the trustee, really sue only in the right of the temple and its trustee; and they should not be permitted to escape from the natural consequences of their suit by arraying the temple and its trustee amongst the defendants, instead of their being co-plaintiffs as in theory they ought to have been. I agree therefore with the decision of my learned brother.

K. C. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

Ramanujam Appalaswamy and others. .. *Petitioners** (*Accused*).

Ramanujam Appalaswamy, *In re.*

Companies Act (VII of 1913), S. 76 (2) and 131—Directors of company —Failure to call general body meeting within time—Condonation by Registrar of Joint Stock Companies—Delay in filing balance sheet—Conviction for offences under Ss. 76 (2) and 131—Sustainability.

The accused were convicted under S. 76 (2) of the Companies Act for not holding a general meeting of the company of which they were the directors within eighteen months of the date of the incorporation. They were also convicted under S. 131 of the Companies Act for not having laid before the general body within eighteen months of the incorporation of the company a balance sheet. It was shown that in reply to a letter from the company the Registrar of Joint Stock Companies had condoned the delay in the following terms: "The delay in holding the general meeting is condoned and the list of members and summary is filed this time".

Held, that inasmuch as the letter of the Registrar condoned the failure of the accused to hold a general meeting they were not liable to be convicted under S. 76 (2) of the Companies Act.

Held further, that as the Registrar had condoned the delay in holding the general meeting he should be deemed to have condoned the delay in filing the balance sheet before the general body at its meeting and that the accused were not liable to be convicted under S. 131 of the Companies Act.

Petitions under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying that the High Court will be pleased

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1. (1917) 33 M.L.J. 357: I.L.R. 41 Mad. 124.

* Crl. R. Cases Nos. 789 and 790 of 1940 (Crl. R. Petitions Nos. 744 and 745 of 1940). 29th January, 1941.

Ramanujam
Appalaswamy,
In re.

to revise the judgments of the Court of the Sub-Divisional Magistrate of Vizianagaram dated 2nd September, 1940 and passed in C. C. Nos. 90 and 89 of 1940 respectively.

S. Suryaprakasam for Petitioners.

K. Venkataraghavachari for *The Public Prosecutor* for the Crown.

The Court passed the following order

Criminal Revision Case No. 789 of 1940.

The petitioners were convicted by the Sub-Divisional Magistrate, Vizianagaram under S. 76 (2) of the Indian Companies Act for not holding a general meeting of the Company of which they are the directors within 18 months from the date of the incorporation; and they have been sentenced to a fine of Rs. 50 each.

One of the defences of the petitioners was that the Registrar had condoned the delay. He was examined as a witness and he says:

"List of members and summary of share capital under S. 32 was delayed. The Registrar of Joint Stock Companies condoned that delay. That has nothing to do with the subject-matter of this case"

The letter of the Registrar, which is Ex. I, says in paragraph 2:

"The delay in holding the general meeting is condoned and the list of members and summary is filed this time."

This letter would appear to condone the failure of the petitioners and the other directors to hold a general meeting within 18 months as required by S. 76.

The learned Sub-Divisional Magistrate, in convicting the petitioner says:

"The letter dated 14th March, 1940 (Ex. I-a) of the Company to the Assistant Registrar (P-W. 1) is about the list of annual members and summary and notice of change in directors. The letter R. C. No. 72 of 1940 dated 7th May, 1940 of the Assistant Registrar is a reply to Ex. I-a. The Assistant Registrar stated that the condonation was of the delay in filing the annual list of members and summary only."

It is true that the directors did not ask expressly in their letter Ex. I-a, to have their delay in holding a general meeting condoned; but the Assistant Registrar, who knew that he would have to condone the failure to hold a general meeting if he had to condone the delay in sending up a list of members and summary, also condoned the delay in holding a general meeting. This is clear from Ex. I. The learned Sub-Divisional Magis-

trate therefore found the petitioners guilty under a misapprehension.

I have asked the learned counsel for the petitioners—as well as the learned Public Prosecutor—whether there is any provision in the Companies Act whereby the Registrar can condone the delay in holding a general meeting, and they have been unable to point out any such provision. S. 131 enables the Registrar to condone only the sending up of balance sheets. It was not however contended in the lower Court that the Registrar had no such power; and so I do not think that any decision on that point is called for here.

The Criminal Revision case is allowed and the conviction and sentence are set aside.

Criminal Revision Case No. 790 of 1940.

This case is connected with Crl. R. C. No. 789. The petitioners have been convicted under S. 131 of the Indian Companies Act of not having laid before the general body within 18 months of the incorporation of the Company a balance sheet. As has been found in Crl. R. C. No. 789 the Registrar condoned the delay in holding a general meeting. He must therefore be deemed to have condoned the delay in filing a balance sheet before the general body at its meeting. The acquittal of the petitioners in the connected case implies that they are not guilty of the offences with which they have been charged in this case.

This Criminal Revision Case is therefore allowed and the conviction and sentence are set aside.

B. V. V. *Petitions allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

Pothapu Timma Reddi .. *Accused**

v.

Kondalu Rami Reddi .. *Complainant.*

Criminal Procedure Code (V of 1898), S. 523—Discretion of Magistrate —Complaint for offence under S. 411 Indian Penal Code—Offence committed found to be one under S. 403 Indian Penal Code—Order for return of cattle seized to—Complainant—Propriety of order.

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* Cr. R. Case No. 1006 of 1940 (Case Referred No. 43 of 1940). 23rd January, 1941.

Timma Reddi *v.* Rami Reddi.

Where a case is struck off as being of a civil nature, it means that the Magistrate has come to the conclusion that a criminal offence has not been made out and that it is only after adjudication by a Civil Court that the ownership of the property can be determined. He is therefore bound to return the property to the person from whom it is taken and so direct the complainant to have recourse to a Civil Court if he is so advised. Where, however, the Magistrate is of opinion that an offence has been made out, but that it was one of criminal misappropriation under S. 403, Indian Penal Code and not of receipt of stolen property knowing or having reason to believe the same to be stolen under S. 411. Indian Penal Code, he has a discretion under S. 523, Criminal Procedure Code, in disposing of the property forming the subject-matter of the complaint, and it is open to him in the exercise of such discretion to hand over the property to the complainant.

Paidi Subbayya v. *Emperor*, (1939) M.W.N. 739, distinguished.

Case referred for the orders of the High Court under S. 438 of the Code of Criminal Procedure by the District Magistrate of Cuddapah in his letter Ref. C. 1 No. 1234/40 dated 15th November, 1940.

Accused not represented.

P. Chandra Reddi for Complainant.

The Public Prosecutor for the Crown.

The Court passed the following

ORDER.—One Kondalu Rami Reddi was given possession of a cow and a calf by its owner for the purpose of grazing in a certain forest. While there, this cow and calf were missing and the information of the complainant was that it had been stolen by Sugalis. According to the facts found during the police enquiry, the complainant searched for these cattle for many months and at last traced them to the house of the accused. The accused said that the cow and calf were his and that he purchased them long before from some Sugalis. As he would not return them, the complainant informed the police, who investigated this as an offence coming under S. 411, Indian Penal Code. They came to the conclusion, upon the acceptance of certain information, that the offence committed was not one punishable under S. 411, Indian Penal Code, but one under S. 403, Indian Penal Code, which is criminal misappropriation. This offence is not cognizable and so the police sent a referred charge sheet to that effect. The Magistrate agreed with the police and ordered the cattle to be returned to the complainant. The accused preferred an appeal to the District Magistrate, who, as no appeal lay, had to dismiss it; but he nevertheless considered that the Taluk Magistrate had erred in not returning the

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property to the person from whom it was recovered. He thereupon made a reference to this Court for action under S. 438, Criminal Procedure Code.

The District Magistrate relied on a case reported in *Paidi Subbayya* v. *Emperor*[1], in which Lakshmana Rao, J., considered a case where a complaint of theft had been preferred and the case eventually struck off as being of a civil nature. That case is clearly distinguishable from the present one. Where a case is struck off as being of a civil nature, it means that the Magistrate has come to the conclusion that a criminal offence has not been made out and that it is only after adjudication by a Civil Court that the ownership of the property can be determined. He is therefore bound to return the property to the person from whom it is taken and to direct the complainant to have recourse to a Civil Court if he is so advised. In the present instance, the Magistrate was of opinion that an offence had been made out, but that it was one of misappropriation and not of the receipt of stolen property knowing or having reason to believe the same to be stolen. The Magistrate in disposing of property which is the subject-matter of a complaint, has a discretion. S. 523 empowers the Magistrate to pass orders with regard to the disposal of property which is alleged or suspected to have been stolen or is found under circumstances which create suspicion of the commission of any offence. These conditions were fulfilled here and I am not prepared to say that the learned Magistrate did not exercise his discretion judicially.

Notice has gone to the accused in this case but he has not put in any appearance.

The reference is not accepted and the papers will be returned.

B.V.V. *Reference answered.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE KRISHNASWAMI AIYANGAR.

Raman Chettiar v. Muthupalaniappa Chettiar.

N. A. R. Rm. Raman Chettiar .. *Appellant* (Petitioner).*

v.

P. N. Muthupalaniappa Chettiar .. *Respondent (1st Respondent).*

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1. 1939 M.W.N. 739.

*L. P. A. No. 47 of 1939. 28th October. 1940.

Raman Chettiar v. Muthupalaniappa Chettiar.

Provincial Insolvency Act (V of 1920), S. 77—Court acting in aid selling property as insolvent's—Claim to property asserting title—Petition to adjudicating court—Direction to file the petition in the court acting in aid—Sufficiency to confer jurisdiction.

The District Court of Ramnad acting under S. 77 of the Provincial Insolvency Act in aid of the District Court of Amherst, Burma, sold certain immovable property through its Official Receiver to the respondent. The appellant filed an application in the Amherst Court claiming that the property sold belonged to the insolvent's daughter by virtue of an award and that she had conveyed the property to the appellant. The Amherst Court returned the petition to the appellant to be filed in the Ramnad Court to which the proceedings with regard to the property had been transferred. The appellant accepted the decision and in due course represented the petition to the court at Ramnad which dismissed the petition for default. The Official Receiver executed a conveyance of the property to the respondent. Subsequently the appellant filed a petition in the District Court of Ramnad asking that possession of the property be re-delivered to him setting up the title which he had claimed in the earlier petition. The respondent contended that the proper court to deal with the matter was the Amherst Court,

Held, that there was no necessity for any special letter of request. The request to act in aid at an earlier stage was sufficient. By directing the appellant to file his petition in the Ramnad Court for adjudication on the question of title the District Court of Amherst acknowledged that it had left the District Court of Ramnad to decide all matters relating to this particular property, and the latter Court had accepted jurisdiction.

In the circumstances, *Held*, that the District Court of Ramnad was the proper Court to decide the question of title to the property sold.

Appeal under Cl. 15 of the Letters Patent against the judgment and order of the Hon'ble Mr. Justice Wadsworth dated 24th August, 1939 and passed in A. A. O. No. 288 of 1937 preferred to the High Court against the order of the District Court of Ramnad at Madura dated 7th July, 1937 and 19th July, 1937 and made in I. A. No. 1 of 1937 in I. C. No. 85 of 1931 on the file of the District Court of Amherst.

N. S. Rangaswami Aiyangar and *T. Nallasivan Pillai* for Appellant.

K. Rajah Aiyar and *K. Ramanathan Chettiar* for Respondent.

The judgment of the Court was delivered by

Leach, C.J.

The Chief Justice.—In 1931 a Nattukottai Chettiar named V. P. L. Palaniappa Chettiar, was adjudicated an insolvent by the District Court of Amherst, Burma. The insolvent's estate was said to include certain immovable property in the Ramnad District, and in consequence the District Court of Amherst requested the District Court of Ramnad to aid it under S. 77 of the Provincial Insolvency Act in the sale of the property.

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The District Court of Ramnad, as it was bound to do acted on the request of the Amherst Court and on the 29th of August, 1934 sold the property through the Official Receiver, the purchaser being the respondent. A month later, the appellant filed an application in the Amherst Court under S. 4 of the Act, in which he claimed that the property which had been sold by the Ramnad Court belonged, not to the insolvent, but to his daughter by virtue of an arbitration award made in the year 1916. The appellant claimed title to the property by reason of a conveyance in his favour executed by the insolvent's daughter on the 14th March, 1934. The District Judge of Amherst considered that the proper Court to deal with this application was the Ramnad Court inasmuch as the proceedings with regard to this particular property had been transferred from Amherst to Ramnad. Accordingly, he returned the petition to the appellant in order that he might file it in the District Court of Ramnad. The appellant accepted this decision and in due course represented the petition to the District Court of Ramnad. For some reason which has not been disclosed the appellant did not proceed any further in the matter and the petition was dismissed for default. The result was that on the 12th February, 1936 the Official Receiver executed a conveyance of the property in favour of the respondent.

On the 7th of December, 1936 the appellant filed a petition in the District Court of Ramnad in which he asked that possession of the property be re-delivered to him, and in his affidavit in support of the petition he set up the title which he had claimed in the earlier petition. Instead of making the application under S. 4 of the Provincial Insolvency Act the appellant purported to make it under S. 5 of that Act and under O. 21, rr. 100 and 101 of the Code of Civil Procedure. Neither S. 5 of the Provincial Insolvency Act nor O. 21 of the Code of Civil Procedure applied, but the District Judge proceeded with the hearing of the application and by an order dated the 19th of July, 1937 directed that the property should be re-delivered to the appellant who, in his opinion, had established a *prima facie* title and had been in possession on his own account from the 25th November, 1936. The respondent then appealed to this Court. When the case was in the District Court the respondent raised the question whether that Court had jurisdiction to entertain the application. His contention was that the proper

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Court to deal with the matter was the Amherst Court, but the objection was overruled. The respondent raised the question again in his appeal to this Court and his objection was accepted by Wadsworth, J., from whose judgment this appeal has been preferred.

The District Court of Amherst had asked the District Court of Ramnad to act in its aid in deciding the question of the title to this property, and having left the matter to the decision of the Ramnad Court, that Court had full jurisdiction by reason of S. 77 of the Act. That section says that all Courts having jurisdiction in insolvency shall severally act in aid of and be auxiliary to each other in all matters of insolvency and an order of a Court seeking aid with a request to another Court shall be deemed sufficient to enable the other Court to exercise jurisdiction. It is true that when the District Judge of Amherst decided that the Ramnad District Court was the proper Court to deal with the earlier petition, there was no special letter of request, but in our opinion, there was no necessity for this. The request had been made at an earlier stage and in directing the appellant to file in the District Court of Ramnad his petition asking for adjudication on the question of title the District Court of Amherst acknowledged that it had left the District Court of Ramnad to decide all matters relating to this particular property.

Mr. Raja Ayyar on behalf of the respondent has conceded that the fact that the earlier petition was dismissed for default does not preclude the appellant from filing a fresh application under S. 4 of the Provincial Insolvency Act although naturally he has pointed out that this application is not one under that section. The Court must, however, treat it as being made under S. 4. The fact that the appellant in error invoked S. 5 of the Act and the Code of Civil Procedure does not preclude the Court from treating the petition as being filed under the appropriate section, namely, S. 4, and that is what we propose to do in this case. If this course were not adopted, it would only lead to further delay and unnecessary expense. It is convenient to both parties to regard the petition as being under the proper section.

Treating it as an application under S. 4, the question of title falls to be decided, and we consider that the proper Court to decide this question in the circumstances is the District Court of Ramnad. The Court which adjudicated the insolvent has

recognised that the District Court of Ramnad had full jurisdiction in the matter as the result of the request made under S. 77 and the District Court of Ramnad has accepted jurisdiction. In these circumstances, the case will be remanded to the District Court of Ramnad for decision on the question of title. Each side will of course be entitled to adduce further evidence, if so desired.

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The District Judge of Ramnad will be directed to intimate to the District Court of Amherst that the question of title to this property is still being debated and to request the Amherst Court not to distribute the money which the respondent has paid for the property until the question has been finally decided. If the appellant succeeds, the respondent, of course will be entitled to the return of his money. If the appellant fails, the property will be re-delivered to the respondent and the sale will stand.

The appellant has only himself to blame for the present position. In the first place he ought not to have allowed the earlier petition to go by default and in the second place he ought to have framed his present petition properly. As he is to blame in both these respects, we consider that there should be no order for costs in his favour.

K. S. *Case remanded.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Bombay.]

PRESENT:—VISCOUNT MAUGHAM, LORD WRIGHT AND SIR GEORGE RANKIN.

Shankarrao Dagadujirao Jahagirdar .. *Appellant**

v.

Sambhu Wallad Nathu Patil and .. *Respondent.*
5 appeals (consolidated).

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Bombay Land Revenue Code (1879), *S.* 83 (ii)—*Ejectment—Inam village—Agricultural tenancies—Presumption of permanence.*

By S. 83 (ii) of the Bombay Land Revenue Code (1879) ". . . . where by reason of the antiquity of the tenancy, no satisfactory evidence of its commencement is forthcoming, and there is no such evidence of its intended duration . . . . it shall, as against the immediate landlord of the tenant, be presumed to be co-extensive with the duration of the tenure of such landlord . . . ."

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* P. C. Appeal No. 50 of 1938. 3rd July, 1940.

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While that paragraph directs that the presumption mentioned in it is to be made on two conditions, (1) that there is no satisfactory evidence of the date of the commencement of the tenancy and (2) that that lack is due to the antiquity of the tenancy, the first condition cannot be excluded by showing that the tenancy had its origin at some date within a period of 20 years which cannot be more precisely ascertained, for that is not satisfactory evidence of the date of its commencement; and, moreover the paragraph does not in referring to the antiquity of a tenancy, intend any reference to remote ages in the past or to the conception in English law of "time immemorial". It is to be given the practical meaning appropriate to its context and afforded by the limits within which living testimony to past facts is necessarily restricted.

Circumstances in which nevertheless *Held*, that the presumption in question could not be applied to tenancies not proved to have been in existence before 1892 notwithstanding that the evidence did not exclude the possibility of an earlier origin.

Narayan Ramachandra v. *Pandurang Balakrishna*, (1922) I.L.R. 47 Bom. 4, disapproved.

The inference of permanence in a tenancy is difficult to make and requires the presence of circumstances explicable, when taken as a whole, only on the hypothesis of permanence.

Circumstances in which *Held* that the mere fact that a rise in the rent of certain agricultural tenancies had at some time taken place was not sufficient, in the absence of other evidence to show that the landlord had a right each year to determine the rent to be charged to the tenant so that the tenancy was an annual one.

Held further, that, notwithstanding the principle that the fact that a tenancy is for agricultural purposes does not *prima facie* indicate that it is permanent or even more than an annual tenancy, that character of the tenancies in question could not in the circumstances be regarded as sufficient in fact or in law to negative the conclusion that they were of a permanent character.

Consolidated appeals from six decrees of the High Court, Bombay in its Civil Appellate jurisdiction dated 4th October, 1934, (Wadia and Macklin, JJ.).

The appellant Sankara Rao Dagadujirao Jahagirdar was the Inamdar of a village under an inam grant of 1798. The respondents were tenants of arable land in the village. The appellant sued the only present contesting respondent for ejectment in the Court of the 1st Class Subordinate Judge of Dhulia and the other five respondents in the Court of the 2nd Class Subordinate Judge Nandurbar. All the suits were successful. The Nandurbar decrees were affirmed on first appeal by the District Judge. The High Court dealt with all the six cases together, reversing the decisions of the Courts below, and the plaintiff had appealed to His Majesty. The facts are stated in detail in the judgment.

W. W. K. Page for Appellant.—It is submitted that the respondents are precluded from relying on S. 83 of the Bombay Land Revenue Code 1879, because of the High Court's finding that

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the tenancies began between 1856 and 1872. The operation of the section is excluded by that finding, it is submitted, because if it is established, as it must be taken to be here, that a tenancy began after a particular year 1856, that is "satisfactory evidence of its commencement." Even if the expression "antiquity" in the section be regarded as having a meaning distinct from that of the expression "time immemorial" in English law, yet it must be interpreted reasonably, and it will not be reasonable to speak of 1856 in terms of antiquity. Moreover, the principle expressed in S. 106 of the Transfer of Property Act 1882 that "in the absence of a contract or local law or usage to the contrary, a lease of immoveable property for agricultural purposes shall be deemed to be a lease from year to year" applies here (even though the Act itself does not). Counsel referred to *Dhondo Vasudev Kanitkar* v. *Secretary of State*[1]. The presumption admittedly raised by the entry made in the Record of Rights after survey is, it is submitted repeated in these cases. Counsel addressed the Court on the issues arising out of the evidence and referred to *Afsal-un-nissa* v. *Abdul Karim*[2], *Maneklal Vamanrao* v. *Bai Amba*[3], *Sidhanath* v. *Chikko*[4], *Chikko Bhagwant Nadgir* v. *Sidhnath*[5], *Narayan Ramachandra* v. *Pandurang Balkrishna*[6], *Ramchandra* v. *Dattu*[7], *Shripadbhat* v. *Rama*[8] and *Babu Lak Raj Roy* v. *Kunia Singh*[9].

No presumption of permanency arises from the fact that at some point the rent payable for the land was enhanced. The Record of Rights must be treated as an *ex parte* statement. These being agricultural tenancies, there is altogether too little material on which to found a presumption that they are permanent.

To summarise:—The evidence of the beginnings of these tenancies was sufficient to exclude the operation in the tenants' favour of S. 83 of the Code of 1879; the evidence as a whole apart from S. 83 does not establish conduct in the appellant and his tenant which shows them to have regarded the tenancies as permanent;— the fact of the increase of the rent indicates not permanency of tenure but rather the exact opposite—namely a power in the landlord to fix the rent payable for each year.

L. P. E. Pugh, K. C., and *J. Nissim* for Respondent were called on to argue only on the inference to be drawn from the increase of rent assessed on the lands. The Government have

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1. (1919) I.L.R. 44 Bom. 110.
2. (1919) 36 M.L.J. 580: L.R. 46 I.A. 131: I.L.R. 47 Cal. 1 (P.C.).
3. (1920) I.L.R. 45 Bom. 350.
4. (1921) 23 Bom.L.R. 533.
5. (1921) I.L.R. 46 Bom. 687.
6. (1922) I.L.R. 47 Bom 4.
7. (1925) 27 Bom.L.R. 1258.
8. (1926) 29 Bom.L.R. 274.
9. (1877) L.R. 4 I.A. 222 at 225.

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power to introduce a survey in a village under S. 95 of the Code without reference to the landlord or any other person interested. They have also power to impose assessments: *See* Ss. 5, 8, 12, 16 and 17 of the Code of 1879. There is no ground in a machinery of assessment or in the way in which the Code has been administered for a presumption that these tenancies are not permanent. Counsel referred to *Nabakumari Debi* v. *Beharilal Sen*[1].

3rd July, 1940. Their Lordships' judgment was delivered by

Sir George Rankin.

SIR GEORGE RANKIN.—In this case six appeals have been consolidated. They are brought from a decision of the High Court of Bombay dated 4th October, 1934, in suits by the appellant for ejectment of the respondents from the lands of their tenancies under him. In each case the basis of the claim was that the tenancy is an annual tenancy determinable at the end of the agricultural year, namely 31st March, upon three months' notice. The lands in question are arable land in the inam village of Khed Digar. This village is in the Shahada Taluka of the West Khandesh District in the Presidency of Bombay, and lies upon the extreme northern boundary of the Deccan where it abuts upon the Barwani State. The total area of the village would appear to be under 1,400 acres and the population about 400 persons of whom a little more than a quarter are Bhils.

The appellant is the Inamdar of the village and traces his title back to an inam grant by the Maratha ruler in 1798. This title was confirmed by the British Government in 1843 and in 1880 a sanad was granted by the Government of Bombay to the appellant's father showing that, subject to the deduction of some 120 acres alienated by grants of earlier date than 1798, the village was the grantee's permanent heritable property held subject to payment to Government of a *judi* or quit rent of 13 rupees per annum, and *nasarana* of rupees 14, annas 8, in all rupees 27, annas 8. It has been contended for the respondents that the appellant is not shown to be a grantee of the village but only of a certain share in the revenue of the village but the finding of the High Court that he is grantee of the soil appears to their Lordships to be so well founded that it is unnecessary to discuss the question afresh.

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1. (1907) L.R. 34 I.A. 160.

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Each of the six suits was brought against a single defendant as sole tenant but this appeal has been contested by one only of the six defendants, namely by the respondent Sambhu Nathu (herein called the first respondent), who was in possession of a large area of 770 acres. He was sued in the Court of the First Class Subordinate Judge of Dhulia on the 26th June, 1928, and he succeeded in that Court upon the ground (which their Lordships think to be erroneous) that the appellant had no title to the soil but only to the revenue of the village. From this decision the appeal to the High Court was a first appeal in which questions of fact as well as of law were open. The other respondents were sued in the Court of the Second Class Subordinate Judge at Nandurbar on the 6th July, 1928. These suits were decreed and ejectment ordered by the trial Judge (20th March, 1930) and on first appeal the District Judge affirmed this decision (8th January, 1931). The High Court dealt with all six cases by one judgment and dismissed the suits (4th October, 1934).

The appellant's father had succeeded to the inam by 1857. He lived till 1904 and was succeeded by the appellant who was then aged eight years. The Collector of West Khandesh was appointed by the District Judge as the appellant's guardian in 1905 and acted as such till the appellant came of age in 1917.

Such documentary evidence as there is of the history of the agricultural tenancies in this village has reference almost entirely to the lifetime of the appellant's father. It consists mainly of documents produced by the appellant to show that the tenancies in question cannot be traced back beyond a certain number of years. The result of the documents in this respect has been found by the High Court to be as follows: that Sambhu Nathu, who has acquired an interest in a large part of the village through purchases of the rights of other tenants made from time to time by his father and by himself, has shown that one of his tenancies goes back to 1855-56 and another to 1856-57, but that he cannot be held to have traced his other tenancies back to a period earlier than the year 1892: and the tenancies of the other respondents likewise are traced only to 1892. By a village ledger (*khatavani*) for the year 1856 it would appear that the lands in the village under cultivation in that year were measured as 15 ploughs (*auts*) and no more. (It is agreed that the

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original meaning of *aut* as a measure of land is as much as could be cultivated by means of a plough with two bullocks.) From other documents it would appear that in 1851, 1852, 1859-1860 the village was deserted (*ujad*). The tenants at this period would seem all to have been Bhils and to have possessed a single plough each. By the late seventies of last century the village had become one of 50 ploughs, and by the early nineties the number of ploughs had increased to about 80, a number which has never been exceeded.

Before the year 1890 the payment made by the tenants to the Inamdar at a time when the tenants were Bhils was 4 rupees per plough. A few persons not Bhils were charged 6 rupees per plough in later years, but by 1890 the amount obtained per plough by the Inamdar was 12 rupees and this was the position at the time when the appellant succeeded in 1904. It is plain that all the tenancies now in question began under a system of *autbandi*; and the question whether any of them have permanent rights is rendered difficult of solution by the fact that evidence of the nature or character of the *autbandi* system of cultivation as it has obtained in this village is neither plentiful nor clear. Their Lordships are not entitled or prepared to assume that it had any necessary similarity to practices which may go by similar names in other parts of India, nor do they know whether it is a system in general use in the Presidency of Bombay. It may originally have been—what the learned Subordinate Judge at Dhulia thought it—a system of assessment to land revenue, or a mere method of measurement and not a kind of tenancy at all. What it became in the village of Khed is the relevant question—a somewhat special question to which the answer must in large measure depend upon what was done and permitted in the time of the appellant's father.

In 1908 the Collector of Khandesh suggested to the Local Government that a survey should be made of the lands of the village and by resolution of the Government of India dated 26th January, 1909, it was decided that such a survey should be undertaken and a Record of Rights prepared. This resulted in 1915 in a Record of Rights, of which it is sufficient to say that it treated the tenants as having permanent tenancies, and on the basis of the survey the proper rents payable to the Inamdar were fixed as 1 rupee per acre. This was to obtain only until 1917-18 when a general revision of the rates of the whole of the

taluka was due to be made. The result of this survey settlement appears to have been a slight increase in the revenue of the Inamdar. In 1918 this settlement was revised and the tenants' rents raised by about one-third to a figure of rupee 1, annas 6 or thereabouts. The appellant who came of age in 1917 accepted rents from the respondents on the footing of these settlements but at the end of 1927 he appears to have decided to evict them and gave notice to quit accordingly.

The oral evidence produced by the appellant in support of his claim amounts to very little. He gave evidence himself but claimed to know little or nothing about the documents produced or the history of the village. Thus in the suit against the first respondent Sambhu Nathu he said that he did not know until the day on which he was giving evidence that the village had been surveyed, or whether a Record of Rights had been prepared, or if any revision survey had been made, or any assistance suits filed on his behalf. Under cross examination for the defendants in the other cases he appeared, however, to know a little more, admitting that there had been a survey settlement, that he had certain lands in the village in his own name let out to tenants upon leases for rents that are at higher rates than the respondents' rents. He admitted also that holders of land in the village had built wells some of which had been made by money lent by himself. His main witness was his clerk Keshav Ganesh, whose evidence is of small value in view of the fact that before 1922 he had no connection with the village though he appears to have officiated as village accountant in some other villages before that period. In the suit against Sambhu Nathu the appellant called a village accountant of the name of Mahadev Ramakant who professed to know about the *autbandi* system. He described it as meaning assessment charged on the basis of so much on each *aut* of land, the quality of the land not being considered in settling the assessment. A tenant, he said, cannot be ousted of his *aut* lands as long as he is cultivating; only fallow lands could be given to fresh tenants. He claimed to make this statement about *autbandi* from what he had seen, though he had not worked as a village accountant in any village where this system was prevailing. He claimed to know the system from a village accountant (*talati*) who had worked in such a village. The system, he said, was in vogue in villages mostly occupied by Bhils, the papers of such villages

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being in the office of the Shahada Taluka. This witness gave his evidence before the First Class Subordinate Judge at Dhulia on the 17th September, 1929, but he was not called by the appellant in the other five cases. Evidence was called for the respondents to the effect that under the *autbandi* system the lands of the tenant were not changed though there were no survey numbers before the survey and settlement was completed in 1915. Sambhu Nathu gave evidence in the suits against the other respondents as well as in his own. He stated in cross examination that one Ganesh Lakshman "was cultivating some land in Khed and plaintiff has retaken it from him" explaining in re-examination that "the land of Ganesh that was retaken was taken by him on new tenure system". A witness Dullav Vedu who explained that his father had four *auts* in Khed, three of which were exchanged by him for land in another village with the father of the first respondent, mentioned also that he was cultivating some other land of the village Khed near the boundary of the village and "it was retaken by the plaintiff". No evidence of either of these two transactions was offered sufficient to enable any Court to ascertain its character. Had there been any case in which the appellant or his father by giving notice had terminated a tenancy and retaken possession of the lands as of right definite evidence to that effect would doubtless have been adduced. No instance of the sort has been proved.

The High Court came to the conclusion that the tenancies in all six cases attracted the provisions of the second paragraph of S. 83 of the Bombay Land Revenue Code 1879:—

"And where by reason of the antiquity of a tenancy, no satisfactory evidence of its commencement is forthcoming, and there is not any such evidence of the period of its intended duration, if any, agreed upon between the landlord and tenant, or those under whom they respectively claim title, or any usage of the locality as to duration of such tenancy, it shall, as against the immediate landlord of the tenant, be presumed to be co-extensive with the duration of the tenure of such landlord and of those who derive title under him".

The learned judges as already mentioned, found that as regards a part of the land of Sambhu Nathu, his tenancy is traced back as far as 1855-56, and that of the other lands all were held in possession of one respondent or another in 1892, the period between 1856 and 1892 being a blank. Hence they

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were of opinion that the tenancies can reasonably be called ancient and that all that has been shown with regard to the commencement of the tenancies found to have been existing in 1892 is that they must have commenced some time during the period of 36 years between 1856 and 1892. Learned counsel for the appellant did not accept these findings contending that a number of the tenancies now in question can be traced back to a more definite origin in the seventies. Apart from this line of criticism, which it is not necessary to follow in detail, their Lordships think that there is some difficulty in the reasoning of the High Court since on any view a number of the tenancies are not proved to have originated before the nineties. Some cases have been cited to their Lordships to show the interpretation put upon this provision of S. 83 by the High Court of Bombay. (*Maneklal Vamanrao* v. *Bai Ambai*[1], *Sidhanath Martand* v. *Chiko Bhagivantrao*[2], *Narayan Ramchandra* v. *Pandurang Balkrishna*[3], *Ramachandra Trimbak* v. *Dattu Rama*[4], *Shripadbhat Anantbhat* v. *Rama Babaji*[5].) Their Lordships think that for the purposes of the present case it is sufficient to note that the particular presumption mentioned in the clause is not directed to be made save upon these two conditions (among others): first, that there is no satisfactory evidence of the date of the commencement of the tenancy, and secondly, that this lack is due to the antiquity of the tenancy. They cannot agree that the first condition is excluded by showing that the tenancy had its origin at some date within a period of twenty years which cannot be more precisely ascertained. This is not satisfactory evidence of the date of its commencement, and the view taken in *Narayan's* case (*supra*) fails in their Lordships' opinion to give effect to the ordinary meaning of the language of the clause. Again, by a tenancy's antiquity the section does not in their Lordships' opinion intend any reference to remote ages in the past or to "time immemorial" in the sense of the English law. It is to be given the practical meaning appropriate to its context and afforded by the limits within which living testimony to past facts is necessarily restricted. As a number of the lands in suit are held under tenancies which are not proved to have been in

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1. (1920) I.L.R. 45 Bom. 350.
2. (1921) 23 Bom. L.R. 533 and I.L.R. 46 Bom. 687.
3. (1922) I.L.R. 47 Bom. 4.
4. (1925) 27 Bom.L.R. 1258.
5. (1926) 29 Bom. L.R. 274

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existence before 1892 their Lordships do not think that the presumption can properly be applied to them, notwithstanding that the evidence by no means excludes the possibility of an earlier origin. They do not proceed as regards any of the respondents upon the presumption authorised by S. 83.

It is clear, however, and it is not disputed on behalf of the appellant, that the respondents have by the Record of Rights been recorded as having a permanent interest. This entry is entitled to the full benefit of the provision of S. 135 J of the Bombay Land Revenue Code of 1879:—

"An entry in the Record of Rights and a certified entry in the Register of Mutations shall be presumed to be true until the contrary is proved or a new entry is lawfully substituted therefor."

This provision is the same in character as that which has long prevailed in Bengal under S. 103B of the Bengal Tenancy Act and it is most important that proper effect should be given to such a statutory presumption. The suggestion that it is materially weakened by the mere consideration that when the record was made the appellant was a minor and that his property was being managed by the Collector on his behalf cannot be accepted; and if it be the case that at the time of the preparation of the record the permanency of the interest of the tenants was not disputed this circumstance of itself in no way detracts from the force of the presumption. So far as regards the five cases which came before the High Court on second appeal the findings of fact of the District Judge, though not his conclusions as to their effect in law, would *prima facie* be conclusive in view of Ss. 100 and 101 of the Code of Civil Procedure. (*Dhanna Mal* v. *Moti Sagar*[1].) But the existence of the Record of Rights does not appear from the judgment of the learned District Judge to have been appreciated by him, and as he has given no effect whatever to the statutory presumption their Lordships are unable to regard the appellant as taking any advantage from the circumstance that five of the cases were dealt with in the High Court upon second appeal. The questions of fact as well as of law were open to the High Court and must be considered by the Board. The broad question before their Lordships is whether the Record of Rights is shown to be untrue, and the view arrived at by the learned District Judge as entitling the plaintiff to succeed in ejectment is that

1. (1927) L.R. 54 I.A. 178, 185: 52 M.L.J 663.

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under the *autbandi* system there was no settled tenancy in the village, the same lands not being cultivated in different years by the same people, cultivation and tenancy being "quite uncertain and fluctuating". The evidence of the plaintiff's witness Mahadev is directly opposed to such a finding; and, though it is not clear from his own evidence whether his knowledge of the system is extensive or gained at first hand, it cannot be regarded as insignificant, coinciding as it does with other evidence firmly pointing to the conclusion that *autbandi* tenants had permanent interest in specific land.

The main features in this other evidence must now be indicated. In a *jarib-kharda* or rough draft of a land survey it is entered by the mamlatdar of the Shahada Taluka for the year 1901-02 that Nathu, father of the contesting respondent, possessed 38 ploughs in the village, "35 permanent as of the last year and three additional in the current year." In similar documents for the years 1897-98 and 1898-99 the same reference to permanent ploughs is to be found. In 1912 when enquiries were being made as to the position of the cultivators in the village the assistant manager, who was acting as an officer of the Collector during the plaintiff's minority, stated before the mamlatdar that the khatedars had always been in management of the same lands, that there was no practice of cultivating lands in one place in one year and in another place in another year, but from the time when lands came to be cultivated they have been in the management of the respective tenants only and their lands have been fixed. He stated also that on this understanding the khatedars had executed purchases as well as mortgages and that decrees of Civil Courts had recognised these rights. This witness is shown by one of the documents to have been khulkarni of the village in 1901-02 and their Lordships are of opinion that his statement was rightly admitted under S. 13 of the Indian Evidence Act. The transactions of sale and mortgage entered into by tenants in respect of lands held on the *autbandi* system are, as the High Court notes, too numerous and important for it to be supposed that the Inamdar or those acting on his behalf did not come to know of them or considered themselves entitled to object to them. It appears that in the case of Sambhu Nathu eleven purchases took place between 1894 and 1899 in the lifetime of the plaintiff's father. Three mortgage-deeds are also shown to have been entered into. These transactions are difficult to explain on the supposition

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that the tenancies were annual tenancies and the absence of objection on the part of the Inamdar reinforces this consideration. It is proved that in 1909-13 (during the minority, it is true, of the appellant), compensation for lands compulsorily acquired by the Government was on two occasions paid not to the Inamdar but to the tenant. Not only were the tenants before 1890 charged for their land at a uniform rate of 4 rupees per *aut* if they were Bhils and a uniform rate of 6 rupees per *aut* if non-Bhil or *Shahu* tenants, but after that year 12 rupees per *aut* was recovered from all tenants without discrimination until the introduction of the survey. Again, the appellant himself holds about 180 acres of land in the village which he has let out to tenants at rates which are substantially higher than the rates charged in respect of the tenancies in suit. From these tenants of his own land he has taken "rent notes" or tenancy agreements though in respect of the tenancies in suit or other *autbandi* tenancies no rent notes would appear to have been taken at any time. It is clear, further, that the interest of the *autbandi* tenant has been treated in numerous cases as heritable, descending from father to son without objection; and at the time of the trial the recognition of the heritable character of the tenants' interest had continued for a very long time. The appellant has from time to time lent money to tenants to sink wells; and it is difficult to think that a tenant who was removable at the end of a year would have undertaken the liability for a capital sum in order to improve his land. The first respondent and at least one other has sublet his lands to others at substantial rents.

These circumstances are sufficient to show that the presumption in favour of the truth of the Record of Rights derives support from a number of independent considerations the cumulative effect of which must be regarded as strong. Unless, therefore, there be something in the documents, produced by the plaintiff to show the history of tenancies in suit and the precarious character of the *autbandi* system, sufficiently strong to overthrow the tenants' claim to have a permanent interest in their lands, it is difficult to refuse agreement to the conclusion of the learned Judges of the High Court that the Inamdar over a long period of years has treated the tenancies as permanent. The documents produced by the plaintiff are in some respects difficult to interpret; and in their Lordships'

view the difficulty arises mainly from the fact that village accountants and other officers, accustomed to accounts which in form are applicable to holders of land paying land revenue to Government, have tended to apply the same language and the same forms to an inam village, notwithstanding that what the tenant pays to the Inamdar is not revenue assessed upon it by Government but rent. Ledgers (*khatavanis*) and lists of tenants (*lavani-patraks*) use the word *akar* (assessment) for the payment and *khatedar* for the tenant. In particular the local fund cess, which is to be calculated on the assessment to land revenue, has in this village been calculated on the *akar*. Outside an inam village, persons similar in occupation to the respondents were paying land revenue to Government and holding as occupants with permanent rights in the land; and it is not difficult to see, if only from the documents produced on behalf of the plaintiff, that the fact of the village having been granted in inam, or alienated, would not readily be regarded as implying that the position of the tenant as against the Inamdar was very markedly different from the position of the khatedar in an unalienated village. A good deal of the history of the village is consistent only with the assumption that it had not occurred to the appellant's father that he should put his tenants in a position lower than their neighbours.

The clear and forceful argument of Mr. Page upon the documents was to the effect that it is necessary to look to the inception of each tenancy and that, as in each case it is clear that the tenancy was granted for the purposes of agriculture, it should not be held that the landlord had parted with so large an interest for an agricultural purpose and at so small a rent. The smallness of the rent, however, adds considerably to the force of the other indications that the tenants were being treated as having permanent right. It is true that many of them were Bhils, a class of persons who have to be treated leniently and are unlikely to be able to support a high rate of rent. In the appellant's favour is the fact that though at one time Bhils were charged 4 rupees only per plough, after the year 1890 a uniform charge of 12 rupees is found to be collected. Their Lordships think that detailed and reliable evidence of the manner in which and the basis on which this increase of rent was made might have had great effect in the present case. From S. 83 of the Bombay Land Revenue Code of 1879 it

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appears that a right on the part of the landlord to enhance a rent payable is not unknown in the Province; as otherwise it would have been unnecessary to enact a saving of this right on the part of the landlord "if he have the same either by virtue of agreement, usage or otherwise." A right of enhancement, though well understood in Bengal under the Permanent Settlement and not inapplicable to tenures which are perpetual (*Bama Sundari* v. *Radhika*[1], *Krishnendra Nath Sarkar* v. *Kusum Kamini Debi*[2],) has not so far as their Lordships know come before the Board in any case arising from the Presidency of Bombay. It might have been much to the interest of the appellant to show the circumstances under which the rent was raised to 12 rupees: whether it was done upon the footing that the appellant had a right to terminate an annual tenancy and to impose such charge as he pleased as a condition of granting a new tenancy, or upon the footing that he was entitled to a customary or other reasonable rate whether based on the value of the staple crops or otherwise. No evidence at all upon this subject was adduced at the trial and their Lordships are wholly unable to accept any of the documents which have been produced as showing that the plaintiff year in and year out determined what the rent chargeable should be for the year. In these circumstances the fact that the tenancies were granted for the purpose of agriculture cannot be regarded as sufficient either in fact or in law to negative the conclusion indicated by so many strong circumstances that the tenancies were of a permanent character. Their Lordships would not willingly cast doubt upon the principle that the fact that a tenancy is for agricultural purposes does not *prima facie* indicate that it is permanent or indeed that it is more than an annual tenancy. The inference of permanence is an inference which it is difficult to make and which requires the presence of circumstances explicable when taken as a whole only on the hypothesis of permanence. A full exposition of the principles upon which such inference is to be made or rejected has been given by the Board in previous cases and need not here be repeated (cf. *Secretary of State for India* v. *Maharajah Luchmeswar Singh*[3], *Nabakumari Debi* v. *Behari Lal Sen*[4].) Their Lordships agree with the High

1. (1869) 13 Moo. I.A. 248.
2. (1926) 52 M.L.J. 412: L.R. 54 I.A. 48: I.L.R. 54 Cal. 166.
3. (1888) L.R. 16 I.A. 6.
4. (1907) 17 M.L.J. 397: L.R. 34 I.A. 160: I.L.R. 34 Cal. 902.

Court in thinking that the inference in the present case is fully warranted.

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Considerable discussion took place before the Board upon the effect of the survey and settlement made between 1909 and 1916 in view of S. III of the Bombay Land Revenue Code of 1879. Attention was drawn to the terms of S. 216 and to the amendments made in 1929 to the provisions of this section. Had their Lordships been of opinion that, independently of the settlement of 1915 and the revision settlement in 1918, the respondents were unable to show a permanent interest in their lands, it would have been necessary to give careful consideration to the question whether the Collector in acting upon the survey settlement and the plaintiff in accepting rents fixed thereunder after he came of age had not given to the respondents a right to claim that they had become permanent tenants. In the result, however, this question does not require to be decided, and their Lordships must not be taken as expressing or as accepting any opinion as to the limits of a Collector's powers under these sections. Their Lordships will humbly advise His Majesty that this consolidated appeal should be dismissed. The appellant will pay to the respondent Sambhu Wallad Nathu Patil his costs of the appeal.

Solicitors for Appellant: *T. L. Wilson & Co.*

Solicitors for Respondent: *Hy. S. L. Polak & Co.*

R.C.C. —— *Appeal dismissed.*

K. S.

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, MR. JUSTICE KING, MR. JUSTICE SOMAYYA, MR. JUSTICE PATANJALI SASTRI, AND MR. JUSTICE HAPPELL.

Sivagurunatha Pillai .. *Appellant** *(Plaintiff)*

v.

Padmavathi Ammal and another .. *Respondents (Defendants).*

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Negotiable Instruments Act (XXVI of 1881), Ss. 27 and 28—Promissory note—Personal liability of maker—Exclusion of—Evidence de hors *the instrument—Admissibility—Maker adding after his description that he is agent of another—Construction.*

* Second Appeal No. 1093 of 1937. 20 December, 1940.

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A promissory note in Tamil was executed in favour of *X* by *S*, son of *V*, the husband and agent under power-of-attorney of *P*, reciting that it was "in respect of the debt due by Sh, my wife's junior paternal uncle". *X* sued *S* and *P* on the note claiming that *S* executed the note in his capacity of a power-of-attorney agent of his wife *P* with due authority to execute the suit note.

Held, (*i*) that circumstances not disclosed in the instrument cannot be looked at when deciding whether the maker was personally liable. The Court cannot travel beyond the instrument in order to decide whether a person has signed as the agent of another. *Sadsuk Janki Das* v. *Sir Kishen Pershad*, (1918) 36 M.L.J. 429: L R. 46 I.A. 33: I.L.R. 46 Cal. 663 (P.C.) applied. *Satyanarayana* v. *Mallayya*, (1934) 68 M.L.J. 540: I.L.R. 58 Mad. 735, disapproved. Case law exhaustively reviewed.

(*ii*) that in India when a person executing an instrument in an Indian language after giving his own description adds that he is the agent of another it means that he is acting as the other's agent in the matter of the execution of the document and that it is sufficient to exclude his personal responsibility.

View of Sundara Aiyar, J., in *Koneti Naicker* v. *Gopala Aiyar*, (1912) 23 M.L.J. 417, approved and that of the Full Bench in the same case in *Koneti Naicker* v. *Gopala Aiyar*. (1913) 25 M.L.J. 425: I.L.R. 38 Mad. 482 (F.B.), disapproved.

Provisions of the English Act distinguished.

Appeal against the decree of the District Court of South Arcot at Cuddalore dated 19th August, 1937 and made in A.S. No. 133 of 1936 preferred against the decree of the Court of the Subordinate Judge of Cuddalore in O. S. No. 14 of 1935.

K. Rajah Aiyar and *S. Ramachandra Aiyar* for Appellant.

T. S. Venkatesa Aiyar, G. R. Jagadisan, V. C. Veeraraghavan and *N. C. Vijayaraghavachariar* for Respondents.

This Second Appeal came on for hearing* in the first instance before Venkataramana Rao, J., who made the following

ORDER OF REFERENCE TO THE FULL BENCH.

This Second Appeal arises out of a suit to recover a sum of Rs. 4,808-4-0 being the principal and interest due on a promissory note dated 24th November, 1932, executed by the second defendant since deceased in favour of the plaintiff. The first defendant is the wife of the second defendant. She was sought to be made liable on the ground that the second defendant executed the promissory note as her agent. Two main questions which arose for decision were (1) Whether the suit promissory note was executed by the second defendant acting as the agent of the first defendant and (2) whether the second defendant is personally liable on the pro-

*3rd September, 1940.

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missory note. The learned Subordinate Judge took the view that the second defendant executed the promissory note as the agent of the first defendant and the first defendant alone was liable. He gave a decree against the first defendant and dismissed the suit as against the second defendant. On appeal the learned District Judge took a different view. He was of the opinion that though the second defendant acted really as the agent of the first defendant in executing Ex. A, on a fair interpretation of the document the second defendant as the maker of the promissory note was personally liable to pay the amount. He therefore set aside the decree against the first defendant and passed a decree against the second defendant. The plaintiff has preferred this Second Appeal.

The question for decision is, is the first defendant liable? Before deciding this question it is necessary to state a few facts. The first defendant got from her paternal uncle Shanmugasundaram Pillai considerable property under a will dated 22nd May, 1928. By the said will she was also directed to pay the debts of the testator. One of the debts was the amount due to Swarnathammal under a promissory note, Ex. C, dated 21st February, 1927, for Rs. 2,420 which carried interest at 9 per cent. per annum. Swarnathammal endorsed this promissory note to Ramasami Pillai on 28th October, 1929. Thus this was one of the debts which admittedly had to be discharged by the first defendant. She, being a female, executed a power-of-attorney in favour of her husband Ex. I, in and by which she empowered him to manage her property including the property she got from Shanmugasundara. She also gave him authority to discharge all the debts payable by her. In pursuance of this power the second defendant executed a promissory note to Ramasami Pillai, Ex. B, dated 11th December, 1929, for Rs. 3,000 carrying interest at 9 per cent per annum. Ramasami Pillai endorsed Ex. B in favour of the plaintiff on 1st January, 1930. In discharge of Ex. B the second defendant executed the suit promissory note Ex. A. The question now is whether the first or the second defendant is liable under the note. This would depend upon the fact whether the second defendant executed Ex. A as a mere agent of the first defendant excluding his personal liability therefor. The description in Tamil of the preamble to the promissory note clearly indicates that he as the first defendant's power agent was executing the note and prominence is given to the first defendant. On a literal rendering of the Tamil the description is "Kuppuswami Pillai's daughter and my wife Padmavati's power agent Velayudham Pillai's son Srinivasa Pillai". In the body of the note the debt due by Shanmugasundara is referred to. This is how the reference is made: "in respect of the debt due by Shanmugasundaram Pillai my wife's junior paternal uncle."

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This is a debt which is primarily payable by the first defendant. If this fact is considered in relation to the power-of-attorney executed by the first defendant in favour of the second defendant, the intention of the second defendant in executing the promissory note was to act on behalf of the first defendant and not to make himself personally liable. This conclusion can only be arrived at by taking into consideration the description in the preamble, the evidence furnished by reference to Shanmugasundara in the body of the note and the will of Shanmugasundara which fastens the liability on the first defendant and the power-of-attorney and the prior pronotes. So far as the will and the power-of-attorney and the prior pronotes are concerned, they would be evidence *de hors* the document. But for that evidence, the contents of the document cannot be said to be self-explanatory. The Full Bench decision in *Kaneti Naicker* v. *Gopala Aiyar*[1], seems to be an authority for the position that such evidence cannot be looked into. Before dealing with 38 Madras, I shall refer to S. 28 of the Negotiable Instruments Act. It runs thus:

> "An agent who signs his name to a promissory note, bill of exchange or cheque without indicating thereon that he signs as agent, or that he does not intend thereby to incur personal responsibility, is liable personally on the instrument, except to those who induced him to sign upon the belief that the principal only would be held liable."

On the grammatical interpretation of the section, an agent in order to escape personal liability must on the note indicate that he signs as an agent or that he does not intend thereby to incur personal liability. It therefore follows that even if a person does not sign as agent, if on the note he has sufficiently indicated that he did not intend to incur personal responsibility, he would escape liability. The question arises, whether the provision in the enactment that the indication of non-incurring of personal liability should be on the note, excludes any evidence oral or documentary outside the document and the conclusion as to non-liability must be arrived at on a consideration of the terms of the note alone. A literal interpretation of the section would seem to exclude all evidence outside the note, The following observations of the Privy Council in *Sadsuk Janki Das* v. *Sir Kishan Pershad*[2], also seem to lend support to this view:

> "It is of the utmost importance that the name of a person or firm to be charged upon a negotiable instrument should be clearly stated on the face or on the back of the document, so that the responsibility is made plain and can be instantly recognised as the document passes from hand to hand. . . It is not sufficient that the principal's name should be in some way disclosed,.

1. (1913) 25 M.L J. 425: I.L.R. 38 Mad. 482 (F.B.).
2. (1918) 36 M.L.J. 429: 46 I.A. 33: I.L.R. 46 Cal. 663 at 668 and 669.

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it must be disclosed in such a way that on any fair interpretation of the instrument his name is the real name of the person liable upon the bills".

Emphasis can legitimately be laid on the use by their Lordships of the expression 'on any fair interpretation of the instrument'. Mr. Rajah Aiyar however contends that those observations are in support of his view and in aid of that interpretation evidence can be admitted. The question did arise in *Koneti Naicker* v. *Gopala Aiyar*[1] whether the Court could travel outside the note for arriving at a decision whether an agent did not intend to incur personal liability. The case was originally heard in the High Court by a Bench consisting of Sundara Aiyar and Sadasiva Aiyar, JJ. The note in that case ran as follows:

"12th August, 1907..........Promissory note executed to you both, (1) Gopala Aiyar and (2) Nagasami Aiyar . . . by R. P. Koneti Nayudu Garu, son of . . . . . agent, holding power-of-attorney from the Zamindar, Doraiyaja Avergal residing in . . . . Amount due to you including principal and interest upto date upon settlement of account of dealings which was standing against the name of Rani Chakkani Ammal on cloths etc., having been purchased ere this for the Vellikurichi Palace is Rs. 694-6-0. On demand, I promise to pay this sum with interest at Rs. 5-8-0 per cent. per mensem from this date either to you or order and shall take this back with the endorsement of payment thereon."

Koneti Nayudu was the third defendant in that case. Defendants 1 and 2 were sought to be made liable on the ground that the debt was incurred for the benefit of defendants 1 and 2 and that the first defendant executed a power-of-attorney in favour of the third defendant, on the strength of which the promissory note was executed. The evidence in that case established the fact that the third defendant acted as the agent of the first defendant. The cloths were purchased for the use of defendants 1 and 2 by Chakkani Ammal referred to in the promissory note, the mother of the first defendant, when defendants 1 and 2 were minors. Sundara Aiyar, J., was inclined to hold that the 3rd defendant was not personally liable and that defendants 1 and 2 were liable. He observed thus in *Koneti Naicker* v. *Gopala Aiyar*[2]:

"Now the debt is said to have been incurred by the first defendant's mother and for the Vellikurichi palace, that is, the palace of the first defendant. It is contended that it was not stated who Chakkani Ammal was. That is entirely unnecessary. The plaintiffs well knew who she was and they well knew that the Vellikurichi palace was the palace of the first defendant. Then follow the words of promise: "I promise to pay this sum of Rs. 694-6-0". The question is, has or has not the third defendant indicated on the note that he does not intend to incur personal responsibility for the debt? He has described himself as the agent of the first defendant holding a power-of-attorney from him. He has described the debt as one binding

1. (1918) 36 M.L.J. 429: 46 I.A. 33: I.L.R. 46 Cal. 663 at p. 668 and 669.
2. (1912) 23 M.L.J. 417.

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on the first defendant and incurred by the first defendant's mother. In instruments executed by the people of this country, it is, in my opinion, very uncommon for the executant to describe himself as agent of another, unless the contract is entered into by him as an agent. In this case, the justification for his acting as an agent is also referred to, namely, that he holds a power-of-attorney from the first defendant."

Sadasiva Aiyar, J., took a different view. He observed thus:

"A mere description in the body of the promissory note (that the maker is an agent) will not exempt him from personal liability. The body of the promissory note only sets out the occasion on which the promissory note came to be executed. Why should a holder of a negotiable instrument be driven to make inquiries whether a man who puts his unequivocal signature to it is really an agent of some other person as he described himself in the body or whether he had authority to bind that principal? The very object of the law merchant might be defeated if, when the executant does not choose expressly to repudiate his own personal liability to the holder (whoever he may be) according to the law merchant, he should be allowed to spell out an implied non-liability on his part by involved arguments and by appeals to the negligent practices of people in the mofussil."

Sadasiva Aiyar, J.'s judgment prevailed. There was then a Letters Patent Appeal which was heard by three Judges (White, C.J., Ayling and Oldfield, JJ.) who confirmed the judgment of Sadasiva Aiyar, J., in *Koneti Naicker* v. *Gopala Aiyar*[1]. This is how White, C.J., sums up his conclusion:

"It seems to me that, *reading the note in question as a whole, on the construction of the document* and on authority, the maker is personally liable."

It is clear from this decision that the view of Sundara Aiyar, J., that one can look into surrounding circumstances for coming to the conclusion whether an agent intended to incur personal liability was not accepted and the view of Sadasiva Aiyar, J., that one cannot travel outside the document seems to have prevailed. If this decision is followed it seems to me that the plaintiff's appeal should fail and Mr. Rajah Aiyar concedes it. But he contends that in view of the later decisions of this Court this decision ought not to be followed. In the Full Bench decision reported in *Satyanarayana* v. *Mallayya*[2], Ramesam, J., delivering the judgment of the Full Bench at p. 739 made the following observations:

"One must look at all the surrounding circumstances in inferring the intention. Seeing that the note was in renewal of earlier promissory notes ultimately leading up to the father's liability, I think this is the proper inference to draw."

In that case the mother executed a promissory note on behalf of her sons but in executing the document she did not describe herself as mother and guardian though the preamble stated it. But the learned Judges referred to the evidence as showing that

1. (1913) 25 M.L.J. 425: I.L.R. 38 Mad. 482 (F.B.).
2. (1934) 68 M.L.J. 540: I.L.R. 58 Mad. 735.

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the note on which the suit was brought was itself a renewal of an earlier promissory note, executed by the mother and that that earlier promissory note was itself in renewal of an earlier promissory note executed by the father of the minors. The earlier promissory notes were taken into consideration for coming to the conclusion whether the mother was personally liable. This seems to be in direct contravention of the decision of the Full Bench in *Koneti Naicker* v. *Gopala Aiyar*[1], which unfortunately was not referred to. No doubt on the actual facts of the case the decision of the Full Bench in *Satyanarayana* v. *Mallayya*[2], may be distinguishable because the makers of the promissory note were stated to be minors and not the mother. This decision was applied by my Lord the Chief Justice and Madhavan Nair, J., in *Seetharamayya Garu* v. *Sathiah*[3]. In that case a promissory note was executed by one Venkataratnamma as the mother and guardian of the minors. In the operative part she stated, "I shall pay the same". The signature of Venkataratnamma alone was appended to the note but she did not add the words describing herself as the mother and guardian of the minors. It was elicited in the evidence that that promissory note was executed by her in renewal of a prior promissory note which itself was executed in substitution of a note given by her husband the father of the minors. Following the observations of the Full Bench in *Satyanarayana* v. *Mallayya*[2] they held that the mother was not liable. I may point out that the decision in *Koneti Naicker* v. *Gopala Aiyar*[1] was not referred to. I may refer in this connection to one or two English decisions showing the view taken in England in regard to this. In *Elliott* v. *Bax-Ironside*[3], Bankes and Scrutton, L.JJ., were of the view that surrounding circumstances could be looked into for coming to the conclusion whether a person signed as agent. In that case the question was whether the directors of a Company called Fashions Fair Exhibition Ltd., were liable on an endorsement made by them. The form of the endorsement ran thus:

"Accepted payable at the *W.* Bank—*A. B.* and *C. D.* Directors—Fashions Fair Exhibition Ltd."

Bankes, L.J., while holding that from the form of the endorsement, they were liable, remarked thus:

"I go further, and I think that for the purpose of construing the indorsement it is permissible to take into consideration the circumstances under which it was made, and the cases of *Macdonald* v. *Whitfield*[5], and *Macdonald & Co.* v. *Nash and Co.*,[6] seem to me to be authorities for that proposition.

1. (1913) 25 M L J. 425: I.L.R. 38 Mad. 482 (F.B.).
2. (1934) 68 M.L.J. 540: I.L.R. 58 Mad. 735.
3. 1938 M.W.N. 677.
4. (1925) 2 K.B. 301.
5. (1883) 8 A.C. 733.
6. (1924) A C. 625.

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The circumstances in which the indorsement was written were that the plaintiff refused to enter into the transaction except upon the terms which he made perfectly plain in his letter to Mason of February, 8, that the bill was 'to be indorsed by your Company's directors on the back.' "

Scrutton, L.J., observed thus:

"I go somewhat further. A Court which is called upon to construe a document is not for that purpose restricted to the perusal of the particular document itself, As is said in Taylor on Evidence, paragraph 1148: "While the controversy is *between the original parties, or their representatives*, all contemporaneous writings relating to the same subject-matter are admissible in evidence, provided only that they be of equal solemnity with the principal document and that no oral testimony be required for the purpose of connecting them therewith." Now here I find that on February, 8, the plaintiff sent to the Company for acceptance two drafts, one of which was that now sued upon, enclosed in a letter in which he insisted that: 'These drafts are to be indorsed by your Company's directors on the back; and the defendant Mason when returning the acceptance on the same date wrote 'I enclose herewith two drafts......duly signed by two directors as requested by you'' therein referring to the indorsements. I think I am entitled to take those letters into consideration as tending to show that the defendants were undertaking personal liability when putting their signatures on the back."

From the observations of these two learned Judges it is clear that they were referring to the evidence *de hors* the document. But from the observations of Scrutton, L.J., it would seem that he would confine the evidence only to contemporaneous writings and exclude all oral evidence. It is not clear whether he would allow prior promissory notes which were relied on in *Satyanarayana* v. *Mallayya*[1] and *Seetharamayya Garu* v. *Sathiah*[2] to be looked into. It is also not clear whether oral evidence should be excluded even to explain the recitals in the note. The reliance by the learned Judge on the passage in Taylor on Evidence which he extracted in his judgment would seem to indicate that such oral evidence would be excluded. I think I should also refer to the decision of Horridge, J., reported in *Kettle* v. *Dunster and Wakefield*[3]. In that case the question was whether one Kettle was entitled to sue. He was appointed receiver on behalf of the debenture-holders of a Company called Ford Paper Works Ltd. The bill on which the action was based ran thus:

"On the 10th August next after date pay to my order" and "for value received"

and they are signed

" R. Kettle, Receiver, Ford Paper Works Ltd."

On behalf of the defendants it was contended that it was drawn on behalf of the Ford Paper Works Ltd., and Kettle was entitled to sue. It was also contended in that case that if the sur-

1. (1934) 68 M.L.J. 540: I.L.R. 58 Mad. 735.
2. (1938) M.W.N. 677.
3. (1927) 138 L.T. 158.

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rounding circumstances were looked into Kettle could not sue. The surrounding circumstances relied on were that the goods were in fact supplied by the Company and that Kettle himself had stated that he had accepted no personal liability. It was held that those circumstances could not be looked into. This is how Horridge, J., observed:

"It was argued before me that in looking at the face of these documents I must take into consideration all the surrounding circumstances; but when those surrounding circumstances come to be analysed they seem to me not to be surrounding circumstances at all, ... What I have got to do is to take the document itself and from that and from nothing else, except surrounding circumstances, which may really be surrounding circumstances, draw the inference what it means. I think that is quite clear from the case of *Chapman* v. *Smethurst*[1], where Kennedy, L. J., quotes with approval the language of Channell, J. I am of the same opinion on both points. I agree with Channell, J., when he says that the question "depends upon the intention of the parties, which intention I think, must be gathered from the terms of the document alone." Applying those tests to this document, I am clearly of opinion that the words 'Receiver, Ford Paper Works (1923) Ltd.' are only words of description and that the documents do not purport to have been made on behalf of the Company at all, and that therefore Mr. Kettle is both liable to be sued and able to sue upon these bills of exchange."

The learned Judge does not explain what he meant when he observed,

"Except surrounding circumstances which may really be surrounding circumstances".

Would the learned Judge permit both oral and documentary evidence to prove surrounding circumstances? The learned Judge refers with approval to the judgment of Scrutton, L.J., in *Elliott* v. *Bax-Ironside*[2], who as already pointed out would exclude all oral evidence but would only admit contemporaneous writings when the question arises between immediate parties. It would seem therefore that Horridge, J., would exclude all oral evidence. Probably the learned Judge would admit documentary evidence of surrounding circumstances. The question again arises, would the surrounding circumstances be limited only to the explaining of any recitals in the note which by themselves are not explanatory? But the citation from Kennedy, L.J.,'s judgment would seem to indicate that the intention must be gathered from the terms of the document alone.

I think it unnecessary to refer to the other decisions of our High Court which take one view or the other. In this state of authorities I think it desirable that this matter should be decided by a Bench.

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1. (1909) 1 K.B. 927 at 930.
2. (1925) 2 K.B. 301.

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Mr. Viraraghavan raised a point that the second defendant had no authority to execute the promissory note on behalf of the first defendant. He put his contention thus. Though Ex. B was executed in substitution of an earlier promissory note in favour of Swarnathammal by Shanmugasundara, the promissory note was executed by the second defendant in his individual capacity without indicating anywhere on the note that he was executing as an agent and on the execution of Ex. B the prior note was cancelled and thus the liability of the first defendant must be deemed to have ceased. But the concurrent finding of both the Courts was that Ex. B was executed with the knowledge and at the instance of the first defendant. As the debt was primarily one which the first defendant had to discharge and therefore her debt and as the second defendant was empowered under the power-of-attorney to discharge her debts, it seems to me that he had sufficient authority to execute the promissory note as her agent. I do not see much force in this contention.

In view of what I have stated above, I direct that the papers be placed before my Lord the Chief Justice for being posted before a Bench.

This Second Appeal came on for hearing before the Full Bench in pursuance of the above-mentioned Order of Reference.

K. Rajah Aiyar and *S. Ramachandra Aiyar* for Appellant.

T. S. Venkatesa Aiyar and *G. R. Jagadisan* for Respondents.

The Court delivered the following

Leach, C.J.

JUDGMENTS.* *The Chief Justice.*—This appeal has been placed before a Full Bench of five judges as its decision calls for the settlement of a conflict which exists in the decisions of *Koneti Naicker* v. *Gopala Aiyar*[1] and *Satyanarayana* v. *Mallayya*[2], each of which was decided by a Full Bench of three Judges of this Court. Stated broadly the question is whether the Court can look into the surrounding circumstances when deciding whether the maker of a promissory note has executed it as the agent or the representative of another. In *Koneti Naicker* v. *Gopala Aiyar*[1], the Court held that the surrounding circumstances could not be inquired into. The question of liability could only be decided on the reading of the instrument. In *Satyanarayana* v. *Mallayya*[2], it was, however, said that one

1. (1913) 25 M.L.J. 425: I.L.R. 38 Mad. 482 (F.B.).
2. (1934) 68 M.L.J. 540: I.L.R. 58 Mad. 735 (F.B.).

*20th December 1940.

could look at all the surrounding circumstances in inferring the intention of the maker.

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The appeal arises out of a suit filed by the appellant to recover the amount due on a promissory note of which he was the holder. The promissory note was executed by the second respondent, who is the husband of the first respondent. The first respondent had granted her husband a power-of-attorney, and it has been suggested on behalf of the first respondent that this power did not give him authority to execute a negotiable instrument on her behalf. The question of authority has been investigated by the Courts below and they have agreed that the second respondent was duly authorised to execute promissory notes on his wife's behalf. The promissory note in suit was a renewal of a previous promissory note, and the Subordinate Judge of Cuddalore who tried the suit and the District Judge of South Arcot on first appeal both held that the earlier promissory note was executed by the husband with the knowledge and at the instance of his wife. The husband was empowered under the power-of-attorney to discharge his wife's debts, and we concur in the finding, as Venkataramana Rao, J., did in his Order of Reference, that the husband had authority to execute the promissory note in suit as the agent of his wife. The promissory note in suit reads as follows:

"Promissory note executed on the 24th November, 1932, in favour of Sivagurunatham Pillai, son of Ramanujam Pillai, residing in Thunisaramedu village, Chidambaram taluk, by me Srinivasam Pillai, son of Velayudham Pillai, the husband and agent under power-of-attorney of Padmavathi Ammal, daughter of Kuppusami Pillai, residing in Gunamangalam village, Chidambaram Taluk:—

"As you have obtained an assignment on 1st January, 1930, of the promissory note executed by me on 11th December, 1929, for Rs. 3000 (Rupees three thousand) in favour of Therku Virudangan Ananta Pillai's son, Ramaswami Pillai, in respect of the debt due by Shanmugasundaram Pillai, my wife's junior paternal uncle, the amount of principal and interest due on the said promissory note is Rs. 3797-4-0 (Rupees three thousand seven hundred and ninety seven and annas four). As I have received this sum in manner stated above, I shall pay interest on the said sum at 15 annas per cent per mensem from this day and pay you, or your order, on demand, the aggregate principal and interest and take back this document after endorsement of payment made thereon.

V. Srinivasa Pillai."

It will be observed that while the signature of the maker is not followed by any words indicating the capacity in which he signed, in the first paragraph of the note he is described as the husband and agent under the power-of-attorney of his wife.

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The wife denied that her husband executed this promissory note as her agent and the husband maintained that he had. Holding that the husband had authority to sign for his wife and had executed this promissory note as her agent, the Subordinate Judge granted the appellant, who is the payee of the promissory note, a decree for the amount claimed. The District Judge, while concurring in the finding of the Subordinate Judge that the husband had authority from his wife to execute the promissory note and had in fact executed it as her agent, held that as the wording of the instrument did not exclude the husband's personal liability he was liable. Accordingly he granted a decree against the husband and dismissed the suit against the wife. The decree-holder has appealed and he asks for the restoration of the decree of the trial Court.

Before examining the judgments in *Koneti Naicker* v. *Gopala Aiyar*[1] and *Satyanarayana* v. *Mallayya*[2], I propose to state the relevant provisions of the Bills of Exchange Act, 1882 and the Negotiable Instruments Act, 1881, because the provisions of the two Acts with regard to the execution of a negotiable instrument by an agent are not the same, and English decisions may not always be in point. S. 23 of the Bills of Exchange Act is in these words:

"No person is liable as drawer, indorser, or acceptor, of a bill who has not signed it as such; Provided that—

(*i*) where a person signs a bill in a trade or assumed name, he is liable as if he had signed it in his own name.

(*ii*) The signature of the name of a firm is equivalent to the signature by the person so signing of the names of all persons liable as partners in that firm."

S. 26 reads as follows:

"Where a person signs a bill as drawer, indorser, or acceptor, and adds words to his signature, indicating that he signs for or on behalf of a principal, or in a representative character, he is not personally liable thereon; but the mere addition to his signature of words describing him as an agent, or as filling a representative character, does not exempt him from personal liability."

The corresponding sections of the Negotiable Instruments Act are Ss. 27 and 28 respectively and they read as follows:

"27. Every person capable of binding himself or of being bound, as mentioned in S. 26, may so bind himself or be bound by a duly authorized agent acting in his name.

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1. (1913) 25 M.L.J. 425: I.L.R. 38 Mad. 482 (F.B.).
2. (1934) 68 M.L.J. 540: I.L.R. 58 Mad. 735 (F.B.).

A general authority to transact business and to receive and discharge debts does not confer upon an agent the power of accepting or indorsing bills of exchange so as to bind his principal.

An authority to draw bills of exchange does not of itself import an authority to indorse.

28. An agent who signs his name to a promissory note, bill of exchange or cheque without indicating thereon that he signs as agent, or that he does not intend thereby to incur personal responsibility, is liable personally on the instrument, except to those who induced him to sign upon the belief that the principal only would be held liable."

Under the English Act, if an agent is to escape liability as a drawer, indorser or acceptor he should add words to his signature indicating that he is signing for and on behalf of his principal. Of course if in the body of the instrument the maker expressly excludes his personal liability this would have the same effect as the adding of suitable words to his signature, but in England negotiable instruments are not usually drawn in this way. Under the Indian Act there is more latitude in the matter of construction. The question is not whether there has been express exclusion of personal liability, but whether on a fair construction of the instrument as a whole the exclusion of personal liability can be inferred. The importance which S. 26 of the English Act attaches to words of exclusion following the signature was not a feature of the decisions in England before the passing of the Bills of Exchange Act in 1882. What was insisted upon was that on the face of the instrument the maker should clearly indicate that he was signing for another, otherwise he would be liable personally. In *Leadbitter* v. *Farrow*[1], Lord Ellenborough, C.J., said:

"Is it not an universal rule that a man who puts his name to a bill of exchange thereby makes himself personally liable, unless he states upon the face of the bill that he subscribes it for another, or by procuration of another, which are words of exclusion? Unless he says plainly 'I am the mere scribe', he becomes liable........Every person, it is to be presumed, who takes a bill of the drawer, expects that his responsibility is to be pledged to its being accepted. Giving full effect to the circumstance that the plaintiff knew the defendant to be agent, still the defendant is liable like any other drawer who puts his name to a bill without denoting that he does it in the character of procurator. The defendant has not so done, and, therefore, has made himself liable."

When *Lindus* v. *Melrose*[2] was before the Court of Exchequer, Pollock, C.B., did say[3]

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1. (1816) 5 M. and S. 334: 105 E.R. 1077.
2. (1858) 3 H. and N. 178: 157 E.R. 434.
3. (1857) 2 H. and N. 296: 157 E.R. 123.

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"On reading the instrument as I have suggested, and looking to the surrounding circumstances, I entertain not the slightest doubt that in fact it was intended as the note of the Company".

But there is no indication that the surrounding circumstances were used to add to the instrument and when the case was before the Exchequer Chamber on appeal it is obvious that it was decided merely on an examination of the words of the note.

It has been argued that *Elliott* v. *Bax-Ironside*[1], is direct authority for the proposition that the Court may look beyond the document and examine the surrounding circumstances when deciding whether personal liability has been excluded by the maker of a negotiable instrument such as we have here, but an examination of the judgments shows that they do not render support for the argument. A bill of exchange was accepted in the following form:

"Accepted payable at the Westminster Bank Ltd., Piccadilly Branch, H. C., Bax-Ironside, Ronald A. Mason, directors, Fashions Fair Exhibition Ltd."

When the drawer sent the bill to the Company for acceptance he wrote saying that as a condition of his doing the work for which the bill was drawn he should require it to be indorsed by the directors as well as accepted by the Company. As the result of this letter the two directors indorsed the bill as follows: "Fashions Fair Exhibition Ltd., *A. B.* and *C. D.* directors", and one of them when returning the accepted bill drew attention in his letter to the fact that it was duly indorsed by two directors of the Company as had been requested. Bankes and Scrutton, L. JJ., were of the opinion that the Court was entitled to look at the surrounding circumstances under which the bill was signed, including the letters which passed between the parties on the subject of the indorsement, from which it was to be inferred that the defendants by indorsing intended to guarantee the payment of the bill. Sargent, L.J., agreed in holding that the directors were liable, but he preferred to base his judgment merely on the contents of the particular bill.

In holding that the surrounding circumstances might be looked into Bankes and Scrutton, L.JJ., placed reliance on *Macdonald* v. *Whitfield*[2] and *Macdonald & Co.* v. *Nash & Co.*[3] *Macdonald* v. *Whitfield*[2] was an appeal to the Privy Council

1. (1925) 2 K.B. 301.
2. (1883) 8 A.C. 733.
3. (1924) 2 A.C. 625.

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from Canada, and in delivering the judgment of the Board Lord Watson observed:

"But it is a well established rule of law that the whole facts and circumstances attendant upon the making, issue, and transference of a bill or note may be legitimately referred to for the purpose of ascertaining the true relation to each other of the parties who put their signatures upon it, either as makers or as indorsers; and that reasonable inferences, derived from these facts and circumstances, are admitted to the effect of qualifying, altering, or even inverting the relative liabilities which the law merchant would otherwise assign to them."

These remarks are confined to the parties who put their signatures upon the instrument. In that case the directors of a Company agreed with each other to become sureties to the bank for the same debts of the Company and as the result of this agreement successively indorsed three promissory notes to the Company. It was held that they were entitled and liable to equal contribution *inter se*. The rule stated by Lord Watson in that case obviously does not apply in the present case. The appellant has not signed the promissory note; he is merely the payee and the question is whether the maker or a third party, whose signature does not appear on the instrument, is liable.

In *Macdonald & Co.* v. *Nash & Co.*[1] the position was this. The appellants sold 19,000 cases of tinned soup, but as the buyers were unable to find the money they applied for financial assistance to the respondents, who undertook as between themselves and the buyers to find 75 per cent. of the purchase price. The appellants, the respondents and the buyers then agreed that the respondents should indorse a series of eight bills of exchange, seven for £1,000 each and one for £. 117 odd, to be drawn by the appellants on the buyers, payable six months after date to the appellants' order, and that the appellants, in consideration of the bills being duly indorsed by the respondents, should hand to the respondents delivery orders for the balance of the cases, some 3,000 cases having been taken up by the buyers. The bills were drawn by the appellants on the buyers, expressed to be payable to the appellants' order, and were accepted by the buyers and indorsed by the respondents. Room was left above the name of the respondents for the indorsement of the name of any person to whom the appellants should direct payment. The respondents then handed the bills to the appellants in exchange for the delivery orders. One bill was discharged, but

1. (1924) 2 A.C. 625.

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before the remaining bills became due the appellants indorsed their name as payee above the respondents' signature. On presentation to the buyers these bills were dishonoured and the appellants claimed payment from the respondents, who denied liability. Thereupon the appellants sued the respondents as indorsers. It was held that the respondents must be taken to have intended to make themselves liable to the appellants on the bills and that the appellants had implied authority to fill in their own name as payee.

The decision in *Macdonald & Co.* v. *Nash & Co.*[1] does not go beyond the rule stated by Lord Watson in *Macdonald* v. *Whitfield*[2] and I consider that *Elliott* v. *Bax-Ironside*[3] goes no further. In my judgment the English decisions lend no support for the suggestion that in a case like the one now before us the Court can travel beyond the instrument in order to decide whether a person has signed as the agent of another. So far as the Courts in India are concerned the question is really governed by the decision of the Privy Council in *Sadsuk Janki Das* v. *Sir Kishan Pershad*[4]. In that case certain *hundis* had been drawn by one Mohan Lal, who had been employed by Maharaja Sir Kishan Pershad, as the superintendent of his private treasury. The hundis were in this form:

"By order of Sirkar, may his happiness increase,

To

Mohan Lal, son of Hira Lal,

Six months from the date of the execution of this *hundi*, please pay to Seth Sadsuk Janki Das Sahu of the Residency Bazaars or to his order the sum of H.S. Rs. 2,500 (half of which is Rs. 1,250) which sum I have received in cash in the Residency Bazaars from the said Seth Sahib.

Dated 3rd Rabi-us-sani, 1328-H (14th April, 1910)

Mohan Lal (In Urdu)

Acting Superintendent of the Private Treasury of His Excellency Sir Maharajah, the Prime Minister of H. H. the Nizam.

(on the back)

This *hundi* has been accepted by Mohan Lal, son of Hira Lal, in favour of Seth Sadsuk Janki Das, inhabitant of the Residency Bazaars, Hyderabad.

Dated 3rd Rabi-us-sani, 1328 Hijiri,

Mohan Lal (In Urdu)."

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1. (1924) 2 A.C. 625.
2. (1883) 8 A.C. 733.
3. (1925) 2 K.B. 301.
4. (1918) 36 M.L.J. 429: L.R. 46 I.A. 33: I.L.R. 46 Cal. 663 (P.C.).

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The question was whether Mohan Lal or the Maharaja was liable. The Privy Council held that the liability rested with Mohan Lal and not with the Maharaja. In delivering the judgment of the Board, Lord Buckmaster said:

"It is of the utmost importance that the name of a person or firm to be charged upon a negotiable document should be clearly stated on the face or on the back of the document, so that the responsibility is made plain and can be instantly recognised as the document passes from hand to hand. In this case the preliminary words mention no more than that Mohan Lal has been directed to execute the *hundis*, and they do not necessarily imply that he has been clothed with authority to execute them in any other form than that in which they were actually prepared—a form which it has already been shown constituted nothing more than a personal liability on behalf of Mohan Lal."

After referring to Ss. 26, 27 and 28 of the Negotiable Instruments Act, the judgment proceeds:

"It is sufficient to say that these sections contain nothing inconsistent with the principles already enunciated, and nothing to support the contention, which is contrary to all established rules, that in an action on a bill of exchange or promissory note against a person whose name properly appears as party to the instrument, it is open either by way of claim or defence to show that the signatory was in reality acting for an undisclosed principal."

There can be nothing plainer than this judgment. It is the instrument and the instrument alone which has to be looked at in deciding whether the maker has excluded personal liability in such a case. Therefore in turning to examine the decisions of this Court in *Koneti Naicker* v. *Gopala Aiyar*[1] and *Satyanarayana* v. *Mallayya*[2], we have this factor well established. Of course, if the authority of the agent is questioned the authority must be established before the instrument is looked at.

The case of *Koneti Naicker* v. *Gopala Aiyar*[1], was decided by White, C.J., and Ayling and Oldfield, JJ. It was heard by three Judges as Sundara Aiyar and Sadasiva Aiyar, JJ., who had heard it in the first instance had disagreed. It has been suggested that the judgment of Sundara Aiyar, J., amounts to an assertion that the surrounding circumstances may be taken into consideration in a case like the present one, but when his judgment is examined it is clear that he was not stating any such proposition. The real conflict between him and Sadasiva Aiyar, J., was that he considered that the promissory note itself indicated that it had been signed by the maker as an agent, while Sadasiva Aiyar, J., took the opposite view. The promis-

1. (1913) 25 M.L.J. 425: I.L.R. 38 Mad. 482 (F.B.).
2. (1934) 68 M.L.J. 540: I.L.R. 58 Mad. 735 (F.B.).

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sory note read as follows:

"12th August, 1907 corresponding to 28th Audi, Plavanga. Premissory note executed to you both, (1) Gopala Aiyar and (2) Nagaswami Aiyar, sons of Soothi Seshaiyer residing in No. 1, Police Station Lane, Madura Town, by R. P. Koneti Nayudu Garu, son of Nanjundappa Naidu Garu agent holding power-of-attorney from the Zamindar Dorai Rajah Avergal and residing in Vellikurichi village, Manamadura Taluk, Madura District.

Amount due to you including principal and interest up-to-date upon settlement of account of dealings which was standing against the name of Rani Chekkani Ammal on cloths, etc., having been purchased ere this for the Vellikurichi palace is Rs. 694-6-0. On demand, I promise to pay this sum of Rupees Six hundred and ninetyfour and annas six with interest at Rs. 5-8-0 per cent. per mensem from this date either to you or order and shall take this back with the endorsement of payment thereon.

(Signed) R. P. Koneti Nayudu."

It will be observed that after stating that he is the son of Nanjundappa Naidu the maker of the note adds he is the 'agent, holding power-of-attorney from the Zamindar Dorai Rajah Avergal.' The note has very much in common with the note now in suit. The question there was whether R. P. Koneti Naidu was personally liable or whether he had executed the promissory note as the agent of the Zamindar. Sundara Aiyar, J., considered that the promissory note should be construed as an instrument made by R. P. Koneti Naidu as the agent of the Zamindar and his reasons may be gathered from the following passage in his judgment: (23 M.L.J. 417 at 421):

"The question is, has or has not the third defendant indicated on the note that he does not intend to incur personal responsibility for the debt? He has described himself as the agent of the first defendant holding a power-of-attorney from him. He has described the debt as one binding on the first defendant and incurred by the first defendant's mother. In instruments executed by the people of this country, it is, in my opinion, very uncommon for the executant to describe himself as agent of another, unless the contract is entered into by him as an agent. In this case, the justification for his acting as an agent is also referred to, namely, that he holds a power-of-attorney from the first defendant. The question whether the third defendant executed the document as agent and whether he has indicated that he did not intend to be personally responsible for the amount of the note is one of construction. In construing the instrument, I think it is proper and necessary to put oneself in the position of the executant, and to take into consideration the habits of the people of this country in the matter of conveyancing. These habits may not be the same as those of people in England or elsewhere, and the construction to be put on an instrument executed by a Hindu here should not necessarily be made to depend on the construction of a similarly worded instrument executed by an Englishman."

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Later in the judgment Sundara Aiyar, J., said:

"Of course, an agent might contract to be personally liable, and it would be open to the payee to prove such an agreement. But, apart from such agreement, I think that in this country, the description itself should be taken to be an indication that the executant should not be personally liable."

Sundara Aiyar, J., also said that if it was open to the maker to prove that he was only a benamidar for a third person, he saw no reason why he should not be entitled to show that he was only an agent for another, but he went on to add that, perhaps S. 28 of the Negotiable Instruments Act would not allow of this and therefore his decision must be taken to have been given on the reading of the promissory note, bearing in mind the manner of expression the maker would ordinarily use.

Sadasiva Aiyar, J., considered that the maker of a negotiable instrument would be personally liable unless in signing he indicated that he was signing as an agent or had expressly excluded his personal liability in the body of the note. He observed:

"Why should a holder of a negotiable instrument be driven to make inquiries whether a man who puts his unequivocal signature to it is really an agent of some other person as he described himself in the body or whether he had authority to bind that principal? The very object of the law merchant might be defeated if, when the executant does not choose expressly to repudiate his own personal liability to the holder (whoever he may be) according to the law merchant, he should be allowed to spell out an implied non-liability on his part by involved arguments and by appeals to the negligent practices of people in the mofussil."

All the members of the Full Bench read the promissory note in the way it was read by Sadasiva Aiyar, J., although Ayling, J., observed that the question was not free from doubt. White, C.J., said that he did not attach importance to the variation of the language between S. 26 of the Bills of Exchange Act and S. 28 of the Negotiable Instruments Act because the legislature intended in both enactments to reproduce the English Common Law, though the language used for the purpose of carrying out their intention was different. As I have already indicated I do not agree that the effect of S. 26 of the English Act is precisely the same as that of S. 28 of the Negotiable Instruments Act, and before us learned counsel have accepted that there is a difference.

In *Satyanarayana* v. *Mallayya*[1], the facts were these. A promissory note was executed by the mother, who was also the

1. (1934) 68 M.L.J. 540: I.L.R. 58 Mad. 735 (F.B.).

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guardian of the minor members of a Hindu joint family, without adding any words of qualification to her signature, but in the body of the note the minors were described as the makers 'represented by their mother and guardian, Venkayamma'. The promissory note was in renewal of an earlier promissory note made by the mother as guardian of the minors and this note was in renewal of a promissory note which had been executed by the father. The judgment of the Court was delivered by Ramesam, J., who stated without any qualification that one must look at all the surrounding circumstances in inferring the intention of the maker. The Courts held that the minors' estate was liable on the promissory note and in arriving at this decision took into consideration the surrounding circumstances. This course cannot be supported. With great respect the Court was wrong in looking at the surrounding circumstances when deciding whether the mother as the maker of the promissory note had excluded her personal liability.

As the Court cannot look beyond what is stated in the instrument in a case like the present one it is now necessary to decide whether the promissory note in suit should be construed in accordance with the judgment of Sundara Aiyar, J., or the judgments of Sadasiva Aiyar, J., and White, C.J. In my opinion the judgment which should be followed is that of Sundara Aiyar, J. It is the duty of the Court to read the instrument and judge its effects from the words used, but a promissory note drawn up in a vernacular language cannot always be construed according to the literal translation into English. While I have no knowledge of the Dravidian languages, I have seen sufficient of the translations of vernacular documents which have come before this Court to realize that to give a fair translation words in English have often to be added, and both my learned brothers Somayya and Patanjali Sastri, JJ., inform me that a Tamilian who wished to indicate that he was signing on behalf of his principal might aptly use the language found in the promissory note in suit and that a Tamilian would read it as an instrument signed by the maker on behalf of his principal. I do not suggest that a document in Tamil or any other language spoken in India should not be given the meaning which the words used ordinarily imply, but in deciding their implication I agree with Sundara Aiyar, J., that one must put oneself in the position of the writer so far as the language used

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is concerned. In this country when a person is describing who he is he gives his father's name and says that he is his son. When in a document such as we have here the person after giving his own description adds that he is the agent of another it means that he is acting as the other's agent in the matter of the execution of the document.

In this case I consider that it is beyond reasonable doubt that when the second respondent added to the statement that he was the son of Velayudham Pillai the statement that he was the husband and agent under power-of-attorney of the first respondent he implied that he was executing the document in his capacity as her agent. The matter does not, however, rest there. The body of the instrument shows that the note was executed in renewal of a previous promissory note executed in respect of a debt owed by the first respondent's junior paternal uncle Shanmugasundaram Pillai, and this gives an indication of the reason why the second respondent was called upon to act on behalf of his wife. She was lending aid to a relation of hers. On a fair construction of the document bearing in mind that it was written in Tamil by a person who would express agency in this way I hold that the second respondent signed it as his wife's agent.

Mr. Venkatesa Aiyar on behalf of the first respondent stated in the course of his argument that if the word 'as' preceded the words 'the husband and agent under power-of-attorney of Padmavathi Ammal' it would be a fair construction of the document to say that the maker intended to exclude his own personal liability. I do not see what difference the absence of the word 'as' makes, because the insertion of the words 'husband and agent under power-of-attorney of Padmavathi Ammal' would be entirely unnecessary unless the intention was to indicate that the second respondent was signing the document as the agent of his wife.

I would sum up the position thus. In *Satyanarayana* v. *Mallayya*[1], the Court erred in saying that circumstances not disclosed in the instrument could be looked at when deciding whether the maker was personally liable and the learned Judges who decided *Koneti Naicker* v. *Gopala Aiyar*[2], erred in refusing to follow the line of approach indicated by Sundara

1. (1934) 68 M.L.J. 540: I.L.R. 58 Mad. 735 (F.B.).
2. (1913) 25 M.L.J. 425: I.L.R. 38 Mad. 482 (F.B.).

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King, J.

Aiyar, J. When it is a matter of construing the effect of an instrument written in Tamil or in any other Indian language, the observations of Sundara Aiyar, J., apply.

It follows from what I have said that I consider that the Subordinate Judge was right, and I would allow the appeal with costs here and below.

King, J.—I agree. As I was a member of the Full Bench which decided *Satyanarayana* v. *Mallayya*[1], I wish to add that to the best of my recollection the question of the propriety of looking into surrounding circumstances was not raised then. Those circumstances were assumed, as constituting the background of facts upon which the case had to be decided. Now that I have had the advantage of hearing that matter fully argued, I agree that in that respect our decision was wrong.

Somayya, J.

Somayya, J.—I agree with the judgment just delivered by my Lord the Chief Justice. I only wish to add that I entirely agree with the observations of my brother Patanjali Sastri, J., as to the mode in which promissory notes and other documents are drafted in this country to indicate that the executant excludes his personal liability and that he is executing the document for another.

Patanjali Sastri, J.

Patanjali Sastri, J.—I agree with my Lord the Chief Justice whose judgment I have had the advantage of reading, and would only add that the appending of the words 'agent under power-of-attorney of etc.,' to the name of the executant is a well-known form commonly employed in Tamil documents to indicate execution in a representative capacity and exclusion of personal responsibility. The words are almost invariably regarded as limiting and qualifying the liability and not merely as describing or identifying the executant. It is indeed difficult to see what descriptive or decorative significance can be ascribed to such words when they are added to a name already adequately described as in the present case.

English decisions holding that words like 'Director', 'Secretary', 'Managing Agents' etc., added to the signatures of parties to negotiable instruments are only descriptive and do not have the effect of excluding personal liability are, in my opinion, more misleading than helpful in determining the intention of parties to similar instruments in India and I respectfully

1. (1934) 68 M.L.J. 540: I.L.R. 58 Mad. 735 (F.B.).

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endorse the protest of Sundara Aiyar, J., in *Koneti Naicker* v. *Gopala Aiyar*[1], against a too rigid and indiscriminating adherence to English rules of construction in interpreting documents executed by the people of this country in their own vernacular. With all respect to Sadasiva Aiyar, J., whose differing judgment prevailed, it seems to me a curious inversion of true canons of construction to apply the English rule based upon a different mode of drawing negotiable instruments prevalent in England to similar instruments executed in India, brushing aside forms of words commonly used in vernacular to express agency as 'negligent practices of people in the mofussil.' In England as pointed out by Lord Ellenborough, C.J., in *Leadbitter* v. *Farrow*[2], it was an universal rule that a man who puts his name to a bill of exchange thereby makes himself personally liable unless he *subscribes it for another or by procuration of another which are words of exclusion* (italics mine). This well-established mode of excluding personal liability was recognised and perhaps made more stringent in S. 26 of the Bills of Exchange Act of 1882, and hence the English rule. But in this part of the country it is the usual practice in drawing a promissory note in vernacular to begin by stating that it is executed by *A B* to *C D* and where such execution is for and on behalf of another, to append the words "agent under power-of-attorney of *X. Y.*", to the name of the executant. No Tamilian would read the promissory note in suit, (Ex. A), except as one executed by the maker for and on behalf of his principal. Promissory notes are not only common among the commercial community in the cities but are popular among the large agricultural community in the mofussil on account of the low stamp duty to which they are subject, and it is to the interest of these communities that no doubts should be thrown on the generally accepted meaning of these words as excluding personal liability on the part of the signatory.

Mr. Venkatesa Aiyar placed reliance on the wording of S. 28 as sanctioning the application of the English rule in this country also. He pointed out that the section begins with the words 'an agent' and not 'a person', thereby indicating that even if the instrument purports to be executed by a person as an agent, that is not sufficient to exclude personal liability. But

1. (1913) 23 M.L.J. 417: I.L.R. 38 Mad. 482 (F.B.).
2. (1816) 5 M. and S. 345: 105 E.R. 1077.

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there is no warrant for supposing that the section presupposes instruments purporting to be executed by an agent as such. All that it means is that a person who is in fact an agent but signs his name without indicating on the instrument that he signs as agent or that he does not intend thereby to incur personal responsibility, is liable as a principal—*Cf.* S. 231 of the Indian Contract Act where the words 'an agent' obviously refer to a person who is in fact an agent and not one who purports to act as such.

Happell, J.—I agree.

K. S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

V. S. Somasundaram ... *Petitioner** (*Accused*).

Somasundaram, *In re.*

Indian Defence Rules 34 (6) (*b*) (*c*) *and* (*d*) *and r.* 38—*Speech by the petitioner against Police—No prejudicial act contemplated—Conviction under rules whether right in the circumstances.*

Where the petitioner was convicted under r. 38 of the Defence of India Rules for having done a prejudicial act and was sentenced to imprisonment as well as to a fine, and the prejudicial act referred to consisted of a speech against the police to the effect that although they were poorly paid men and of no status, they gave themselves airs and strutted about doing no work etc.,

Held, that the speech of the petitioner did make him guilty of an offence under S. 124-A of the Indian Penal Code, but it was not a prejudicial act within the meaning of r. 34 (6) (*b*) or 34 (6) (*c*) or 34 (6) (*d*). The speech when read as a whole, could not be made out to be an incitement to attack or to use force against the police, although it might cause disaffection against them. Therefore the conviction under the Defence Rules was not proper.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying that the High Court will be pleased to revise the judgment of the Court of the Chief Presidency Magistrate, Egmore, Madras dated 14th October, 1940 and passed in C. C. No. 270 of 1940.

S. Suryaprakasam for Petitioner.

Crown Prosecutor for the Crown.

The Court passed the following

ORDER.—The petitioner has been convicted under r. 38 of the Defence of India Rules for having done a prejudicial act

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* Crl. R. C. No. 967 of 1940. 5th February, 1941.
(Crl. R. P. No. 920 of 1940).

Soma-sundaram, *In re.*

and sentenced to imprisonment till the rising of the Court and to a fine of Rs. 50.

"Prejudicial Act" is defined in r. 34 (6). Many groups of prejudicial acts are described in this rule, but the learned Crown Prosecutor relies on sub-clauses (b), (c), (d) and (l). The learned Magistrate has not referred in particular to any of these sub-clauses; but has merely said that the speech of the petitioner is a prejudicial act which is punishable under r. 38 (5). The speech of the petitioner consisted of a tirade against the police. He said that although they are poorly paid men of no status, yet they give themselves airs and strut about doing no work. He suggests that they are acting against the workers in the interests of the capitalists. The speech also contains threats of what might be done to the police if they continue as they are at present.

Cl. (*b*) of r. 34 (6) is:

"to cause disaffection among, or to prejudice, prevent or interfere with the discipline, health or training of, or the performance of their duties by, members of His Majesty's forces or public servants."

This speech was certainly not intended, nor was it likely to cause disaffection among the members of the police force, although it might cause disaffection among the public against the police force. It seems to me that the speech of the petitioner did make him guilty of an offence under S. 124-A of the Indian Penal Code for sedition; but it was not a prejudicial act within the meaning of r. 34 (6) (*b*).

Cl. (*c*) is:

"to render any member of His Majesty's forces or any public servant incapable of efficiently performing his duties as such, or to induce any member of His Majesty's forces or any public servant to fail in the performance of his duties as such".

It would need a great stretch of imagination to make the speech or the remarks of the petitioner fit into this clause.

Cl. (*d*) is:

"to prejudice the recruiting of, or the attendance of persons for service in, any of His Majesty's forces or any police force or fire brigade or any other body of persons entered, enrolled or engaged as public servants."

All that can be said with regard to the application of this clause is that the members of the public might possibly be inspired by fear of what the workers would do to them if they joined the police force, if they came to know what was said and took it seriously; but the speech was not likely to have that

Somasundaram, In re.

effect because it was addressed to the workers, who presumably had no intention of becoming constables.

Sub-cl. (1) applies more nearly than any of the others and runs:

"to instigate directly or indirectly the use of criminal force against public servants generally or any class of public servants or any individual public servant."

Although the speech is a strongly worded one, I do not think that it can be said that the petitioner intended to instigate the use of criminal force, against public servants, nor do I think that what he said was likely to have that immediate effect. The speech was not an incitement to personal violence, but rather an exposition of the part that the police were playing as the agents and tools of capitalists in preventing the workers from expressing their grievances and securing their rights. If the speech is read as a whole it is difficult to spell out any incitement to attack or to use force against the police, although it might cause disaffection against them. In fact, the learned Crown Prosecutor does not rely very strongly on this sub-clause, but rests the case for the Crown rather on sub-clauses (*b*), (*c*) and (*d*). The learned Magistrate while saying that there was a prejudicial act, does not say why.

The petition is allowed and the conviction and sentence set aside. The fine is said to have been paid and there will be an order that it should be refunded.

K. C. —— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

S. Subbaramayya .. *Petitioner** (*Petitioner-Judgment-debtor*).

v.

Segu Pedda Subbiah (deceased) and others. *Respondents* (*Repondent-Decree-holder and his L. Rs.*)

Subbaramayya v. Subbiah.

Madras Agriculturists' Relief Act (IV of 1938), S. 3 (ii), Proviso C Explanation—Assessment on basis of capital value—Calculation of rental value—Proper procedure.

Where the assessment on properties is on the basis of capital value, under the explanation to S. 3 (ii), Proviso C of Madras Act IV of 1938, the rental value must be calculated at 5 per cent. of the capital value. It is not

* C.R.P. No. 1551 of 1939. 10th December, 1940.

open to the Court to take evidence of actual rent paid, capitalise this on the 5 per cent. basis and hold that the capital value on which the assessment was based was not the actual figure adopted but the fictitious figure thus calculated.

Subba-ramayya v. Subbiah.

Petition under S. 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the Court of the District Munsif of Gooty dated 6th August, 1938 and made in E.A. No. 283 of 1938 in E. P. No. 713 of 1937 (O.S. No. 21 of 1927 District Munsif's Court, Kurnool).

K. S. Jayaram for Petitioner.

E. Venkataramana Rao for Respondents.

The Court delivered the following

JUDGMENT.—The order of the District Munsif cannot be sustained. The most that can be taken to have been established against the petitioner is that he was assessed on two properties one bearing a capital value of Rs. 3,000 and the other a capital value of Rs. 3,150. The assessment being on the basis of capital value, under the explanation to S. 3 (II) Proviso C to Madras Act IV of 1938, the rental value must be calculated at 5 per cent. of the capital value. It is not open to the Court to take evidence of actual rent paid, capitalise this on the 5 per cent. basis and hold that the capital value on which the assessment was based was not the actual figure adopted but the fictitious figure thus calculated. On the figures in the assessment registers the petitioner is clearly outside the exception in Proviso C. The Revision Petition is allowed with costs and the application is remitted to the trial Court for fresh disposal in the light of this judgment.

K. S. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

Ry. T. P. Vinayaka Rao Sahib Bhonsle ... *Petitioner* (Petitioner).*

v.

The Junior Prince's Estate, represented by the Official Receiver, West Tanjore. *Respondent (Respondent).*

Vinayaka Rao v. The Junior Prince's Estate.

* A. A. O. No. 441 of 1938. converted into C. R. P. No. 1859 of 1940.

4th November, 1940.

Vinayaka Rao v. The Junior Prince's Estate.

Madras Agriculturists' Relief Act (IV of 1938), S. 21—Restitution—Liability as debt—Amount claimed against son after partition—Insolvency of father—Right by son to apply for benefit of Act.

The liability to make restitution is a debt and it is no less a debt when due from the son of the original party by reason of his possession of family property after partition.

Vasantharao Sahib Bhonsle v. *Narayanaswami Aiyar*, (1939) 2 M.L.J. 745, approved.

The insolvency of a Hindu father does not prevent the son from applying for the benefits of Act IV of 1938. S. 21 of the Act bars only an application by the insolvent and not one by some other non-insolvent person liable for the same debt.

Suryanarayana v. *Ramamma*, (1940) 2 M. L. J. 291, approved.

Appeal treated as Civil Revision Petition under S. 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the District Court of West Tanjore dated 15th August, 1938 and passed in E. A. No. 107 of 1938 in E. P. No, 18 of 1937 in O. S. No. 3 of 1919.

S. V. Venugopalachari for Petitioner.

K. S. Desikan for Respondent.

The Court delivered the following

JUDGMENT.—This appeal has been treated as a revision petition and the appellant will pay the deficient court-fee. The question whether the liability to make restitution is a debt is covered by the decision of Pandrang Row, J., in *Vasantharao Sahib Bhonsle* v. *Narayanaswami Aiyar*[1], with which we are in respectful agreement. Such a liability is clearly a debt and it is no less a debt when due from the son of the original party by reason of his possession of family property after partition. The further question whether the insolvency of the father prevents the son from applying for the benefits of Act IV of 1938, by reason of S. 21, is also covered by the same decision which is followed by one of us in *Suryanarayana* v. *Ramamma*[2]. Clearly S. 21 only bars an application by the insolvent and not one by some other non-insolvent person liable for the same debt. The appeal, treated as a revision petition is allowed with costs from the estate and the application is remitted to the lower Court for disposal after determination of the question whether the applicant is an agriculturist.

B. V. V. —— *Petition allowed.*

1. (1939) 2 M.L.J. 745. 2. (1940) 2 M.L.J. 291.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATARAMANA RAO AND MR. JUSTICE HORWILL.

Suddapalli Satyanarayana .. *Appellant** (*Respondent 11*)

v.

Chapalamadugu Rangayya and others .. *Respondents* (*Petitioner and Respondents 1, 3 to 8 and 10*).

Satya-narayana *v.* Rangayya.

Civil Procedure Code (V of 1908), Ss. 144 and 146—Right to mesne profits by way of restitution—If assignable—Transferee if can be recognised—O. 20, r. 16 and S. 146, Civil Procedure Code—Transferee if can apply for restitution.

The right to recover mesne profits by way of restitution under S. 144, Civil Procedure Code, is a right which can be assigned and it would be open to the Court to recognise the transfer under S. 146, Civil Procedure Code and allow the transferee to apply for restitution under S. 144.

Appeal against the order of the Court of the Subordinate Judge of Bapatla dated the 6th of January, 1937, and made in E. P. No. 146 of 1930 in O. S. No. 72 of 1910.

K. Rajah Aiyar and *K. Kotayya* for Appellant.

M. S. Ramachandra Rao, D. R. Krishna Rao, R. Hariprasada Rao and *B. S. Ramachandra Rao* for Respondents.

The judgment of the Court was delivered by

Venkata-ramana Rao, J.

Venkataramana Rao, J.—In this civil miscellaneous appeal two points were urged by Mr. Rajah Aiyar on behalf of the appellant (1) that the application by the first respondent as transferee-decree-holder is incompetent on the ground that there was no decree in favour of the alleged assignors which could be transferred and (2) that the transfer is not binding on the appellant on the ground that it has not been proved to be for a valid necessity.

In regard to the first contention there can be no doubt that the assignors of the first respondent were entitled to recover mesne profits in pursuance of the appellate decree in O. S. No. 72 of 1910 on the file of the Sub-Court, Bapatla. It is not disputed by Mr. Rajah Aiyar that they were competent to apply for recovery of mesne profits by way of restitution under S. 144, Civil Procedure Code. If they were competent to do so, we do not see any reason why their assignee is incompetent to do so. The right to recover mesne profits which

* A. A. O. No. 76 of 1937. 28th October, 1940.

Satya-narayana v. Rangayya.

Venkataramana Rao, J.

the assignors were entitled to under the said decree is assignable. We are inclined to treat the application presented by the first respondent as an application for restitution after recognising the transfer in his favour. Whether O. 20, r. 16 is strictly applicable or not, it would be open to the Court to recognise the transfer under S. 146, Civil Procedure Code, and allow the transferee to apply for restitution. If we are inclined to take this view, Mr. Rajah Aiyar has not been able to adduce anything against it. We therefore overrule the contention of Mr. Rajah Aiyar in this behalf.

In regard to the question of consideration there was a finding in the partition suit O. S. No. 63 of 1932 that it was binding on the members of the family including the appellant. The transfer was found to be for a valid necessity. There was no appeal against that decree in respect thereof and the matter has become final. The appellant was impleaded in the execution proceedings only as legal representative of his father and so far as his father is concerned the transfer was binding on him. His right to impeach the binding nature of the transaction, as already stated, having become final, it is not open to him to reopen it in this appeal. In the result the appeal fails and is dismissed with costs.

S.V.V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE LAKSHMANA RAO.

Govindarajulu Naidu .. *Petitioner** (*Accused*).

Govindarajulu Naidu, *In re.*

Motor Vehicles Act (*VIII of* 1914), *S.* 112—*Madras Motor Vehicle Rules, R.* 138—*Motor lorry registered for private use—User for purposes of hire—Prosecution of owner under r.* 138—*Propriety.*

Where the petitioner who was the registered owner of a motor lorry for private use was alleged to have suffered his driver to carry goods of another person for hire,

Held, that the facts alleged disclosed an offence under r. 138 of the Motor Vehicle Rules and the offence would be punishable under S. 112 of the Motor Vehicles Act.

Held further, that the power conferred on the transport authority to suspend the permit in such cases could not be regarded or treated as a penalty for the offence and the prosecution of the petitioner under S. 112 was not illegal.

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* Crl. M. P. No. 334 of 1940. 15th August, 1940.

Govindarajulu Naidu, *In re.*

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to quash the proceedings in C. C. No. 15 of 1940 on the file of the Court of the Sub-Magistrate, Kodaikanal.

K. S. Jayarama Aiyar and *C. K. Venkatanarasimham* for Petitioner.

A. S. Sivakaminathan for *The Public Prosecutor* for Crown.

The Court passed the following

ORDER.—The petitioner is the registered owner of a motor lorry for private use and he is alleged to have suffered his driver to carry goods of another person for hire. This would unquestionably be an offence under r. 138 of the Motor Vehicle Rules and the offence would be punishable under S. 112 of the Motor Vehicles Act if no other penalty is provided for it. The power conferred on the transport authority to suspend the permit in such cases cannot be regarded or treated as a penalty for the offence, and the prosecution of the petitioner under S. 112 of the Motor Vehicles Act is not illegal. There is therefore no ground for quashing the proceedings and the petition is dismissed.

B. V. V. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PANDRANG ROW.

Chithuri Ramamohana Rao ... *Petitioner** (*Respondent—1st Defendant*).

v.

Peteti Raghavamma and others ... *Respondents* (*Petitioners—Plaintiffs & 2nd Defendant.*)

Ramamohana Rao *v.* Raghavamma.

Civil Procedure Code (V of 1908), O. 41. r. 20—Appeal—Necessary party—Omission to implead—If can be impleaded during the hearing when the omission was deliberate.

A suit was brought by two daughters to declare that two alienations made by the third defendant their mother in favour of the second defendant (the husband of the plaintiffs' sister who was also impleaded as the fourth defendant) were not binding on the plaintiffs and the fourth defendant. The suit was dismissed and in the appeal therefrom by the plaintiffs, the second and third defendants were not impleaded as respondents. The first defendant contended that the appeal was liable to be dismissed *in limine*

* C. R. P. Nos. 745 and 746 of 1939. 19th November, 1940.

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in view of the omission to implead the second defendant. It was found that the omission was deliberate and wilful and not due to any mistake. On an application to implead the second defendant after the objection was raised,

Held, that there was no jurisdiction to pass an order directing the impleading of the second defendant as a party respondent to the appeal.

Petitions under S. 115 of Act V of 1908 praying that the High Court will be pleased to revise the orders of the District Court of Kistna at Chilakalapudi dated 30th March, 1939 and made in I. A. No. 161 of 1939 and 221 of 1939 respectively in A. S. No. 284 of 1938.

V. Govindarajachari and *P. Sivaramakrishnayya* for Petitioner.

P. Satyanarayana Rao for Respondents.

The Court delivered the following

JUDGMENT.—These are petitions to revise the orders of the District Judge of Kistna dated the 30th March, 1939 allowing two persons to be impleaded as respondents in an appeal which had come on for hearing and in which an objection had been taken by the only respondent in the appeal till then that the appeal itself was liable to be dismissed ***in limine*** in view of the omission to implead one of those persons as a respondent, namely, the second defendant in the suit. The application to implead the second defendant was made by the appellants. The other application was made by the third defendant herself to be impleaded as a respondent. Both the applications were allowed by the Court below in very short orders which merely were to the effect that the persons in question were to be added as respondents subject to objections that might be made regarding amendment of the grounds of appeal.

So far as C. R. P. No. 746 of 1939 is concerned, it relates to the application by the third defendant to be made a respondent. In that petition there has not been very serious opposition, because it is impossible to say that the third defendant has any interest in coming on record in an appeal while the trial Court's decree was entirely in her favour and the suit was dismissed by the trial Court as against her. The suit was to declare that two alienations made by the third defendant in favour of the second defendant are not binding on the plaintiffs and the 4th defendant after the lifetime of the 3rd defendant,

the third defendant being the mother of the plaintiffs and the fourth defendant being a sister of the plaintiffs, the plaintiffs themselves being sisters. The second defendant is the husband of the fourth defendant and both the alienations that were sought to be declared not binding were alienations made in his favour by his mother-in-law. The decree of the trial Court was that the suit is dismissed. In these circumstances it is difficult to understand what possible interest the third defendant could have in asking the appellate Court to implead her as a party respondent when the appellants themselves did not implead her as a respondent and did not even subsequently apply to implead her. No interest has been established and the application should have been dismissed because it did not comply with the conditions of O. 41, r. 20, Civil Procedure Code. The order of the lower Court directing that the third defendant be impleaded as a respondent is accordingly set aside and the petitioner in this petition (C. R. P. No. 746 of 1939) will have his costs in the petition from the third defendant (respondent).

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As regards the other civil revision petition it is contended that the non-impleading of the second defendant in the appeal originally was due to a mistake. It is alleged in the affidavit filed in support of the application that the second defendant was not added originally as a respondent because it was believed that as he was *ex parte* in the trial Court his presence might not be necessary in the appeal. It was also mentioned that the omission to add the second defendant as a respondent was due to a *bona fide* mistake on the part of the appellants, the *bona fide* mistake being that because there was a subsequent sale of the property by the second defendant to the first defendant who at the time of the suit was only a mortgagee under the second defendant, it was considered that the first defendant having become the owner of the property could sufficiently represent the property and it was not necessary to make the second defendant also a party. The alleged mistake was denied in the counter affidavit and it is abundantly clear that there could not have been any *bona fide* mistake. The non-impleading of the second defendant was deliberate. The Memorandum of appeal was returned by the District Judge and the appellants were asked to state why all the parties to the proceedings in the lower Court had not been added as parties in the appeal. And the reply to this query by the appellants'

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advocate was that defendants 2 to 4 are not necessary parties as no relief is claimed against them in the plaint and as they were *ex parte* and it was the first defendant who was affected by the decree. In other words, there is a distinct statement by the advocate for the appellants that defendants 2 to 4 were not joined because they were not necessary parties and because no relief had been claimed against them in the plaint and also because they were *ex parte*. It is not shown how these statements were made owing to any mistake on the part of the advocate. No affidavit by the advocate has been filed to show that he made any mistake. I have no doubt that in this case the non-impleading of the 2nd defendant in the first instance was deliberate and wilful and that the subsequent attempt made months after the appeal against him had become barred, was merely due to the fact that preliminary objection was raised at the hearing of the appeal that in the absence of the 2nd defendant the appeal could not proceed. This is in my opinion a case which is covered by the decision of their Lordships of the Privy Council in *Chockalingam Chetty* v. *Seethai Achi*,[1] The following observation in that case applies to the present case with all force:

> "Giving these words (the words in O. 41, r. 20, C. P. C.) their natural meaning—and they cannot be disregarded—it seems impossible to say that in this case the defendants against whom these suits have been dismissed, and as against whom the right of appeal has become barred, are interested in the result of the appeal filed by the plaintiff against the other defendants."

So far as O. 41, r. 33 Civil Procedure Code is concerned it is clear that the lower Court did not purport to act under the special powers provided therein, though it is mentioned among the several provisions in the preamble to the petition. The question whether the appeal is maintainable in the absence of the 2nd defendant is not a question that need be decided in this revision petition; that is a question to be decided by the Appellate Court when the appeal comes on for hearing. So far as the order which directs the impleading of the 2nd defendant as a party respondent is concerned, it seems to me that the order was made without jurisdiction because the conditions prescribed by law for impleading a party respondent were not satisfied. That order is therefore set aside and this petition is allowed with costs.

K. S. —— *Order set aside.*

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1. (1927) 6 Rang. 29: 54 M.L.J. 88.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

The Crown Prosecutor .. *Appellant**

v.

Gopal *alias* Malayalathan .. *Respondent (Accused).*

Crown Prosecutor *v.* Gopal.

Evidence—Expert—If Court bound to accept his evidence—Proper course for the Court.

The Court is not bound to accept the evidence of an expert, even though there are no special reasons for not accepting it. It is proper on the part of the Magistrate to satisfy himself by personal examination about the identity of the impressions of fingers found during investigation with those of the fingers of the accused.

The proper course for the Court is not to compare all the points made by the expert merely with aid of the notes but to ask the expert to elucidate in Court his notes, to explain the reasons for his opinion and to point out in the two impressions the points of identity which he has found.

Appeal under S. 417 of the Code of Criminal Procedure 1898, against the acquittal of the aforesaid respondent (accused) by the Special Honorary Presidency Magistrate, George Town, Madras in C. C. No. 2541 of 1940 on the file of the Court of the Presidency Magistrate, George Town, Madras.

Appellant in person.

N. T. Ragunathan for Respondent.

The Court delivered the following

JUDGMENT.—The house of P.W. 4 was broken into and in the process some panes of glass were broken. The only clue that the investigating officer was able to obtain was that on the broken panes of glass there were some impressions of fingers. These were photographed and magnified and sent to the Finger Print Bureau. The accused was arrested on suspicion and the impressions of all his fingers were taken. They were compared by an expert of the Bureau (P.W. 1), who has given evidence to the effect that the impressions found on the glass were those of two of the fingers, namely, the left index finger and the left ring finger of the accused. The Special Honorary Presidency Magistrate declared himself not satisfied by this evidence and gave the accused the benefit of the doubt. The Crown has appealed against this decision.

The Court is not bound to accept the evidence of an expert, even though there are no special reasons for not accepting it; and it was certainly proper on the part of the Magistrate to satisfy himself by personal examination that the impressions of the accused and of those on the broken glass were identical.

* Crl. Appeal No. 760 of 1940. 21st January, 1941.

Crown Prosecutor v. Gopal.

Even though he did not feel himself to be expert, yet he was bound, unless he was himself satisfied that the expert's evidence was correct, to acquit the accused. As the learned Magistrate did compare the impressions, I do not think this Court should set aside the acquittal merely because the learned Magistrate might have adopted a sounder procedure.

One of the impressions found on the glass was a fairly good one, but the other was somewhat blurred; and it was probably difficult for the learned Magistrate to compare all the points made by the expert merely with aid of the notes. What he should have done was to have asked the expert in Court to elucidate his notes and to point out in the two impressions the points of identity which he had found. The expert filed his notes with his evidence and he has pointed out no less than 11 points of identity with regard to one impression and 10 points with regard to the other. If these points of identity really do exist, then there can be no doubt that the expert satisfactorily proved that the impressions on the glass were those of the accused. Unfortunately, the expert had no opportunity of explaining to the Magistrate. The Magistrate let him leave the box without questioning him with regard to any single point of his evidence. Although I am not interfering with the order of acquittal, I would like to express a hope that the learned Magistrate, if he has to deal with the evidence of an expert witness in future, he will take the pains to have the expert explain in Court the reasons for his opinion. It is only after hearing those reasons in detail that the Magistrate would be in a position to express a sound opinion whether or no the expert's opinion is satisfactory.

The appeal is dismissed.

S. V. V. —— *Appeal dismissed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Ordinary Original Civil Jurisdiction).

F.B.

Commissioner of Income-tax, Madras v. Murugappa Chettiar.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, MR. JUSTICE KING AND MR. JUSTICE KRISHNASWAMI AIYANGAR.

The Commissioner of Income-tax, Madras .. *Petitioner**.

v.

K. M. Ct. Murugappa Chettiar, Kanadukathan ... *Respondent.*

*O. P. No. 275 of 1938. 1st February, 1940.

F.B.

Commissioner of Income-tax, Madras v. Murugappa Chettiar.

Income-tax Act (IX of 1922), S. 4 (2)—Sum remitted from British India to a person in a native state—Amount paid and cashed outside British India—Whether the fact the payee happened to be a creditor of the assessee's firm made any difference.

Unless profits made abroad are received in British India there can be no question of taxation here.

Multanchand Johurmull v. *Commissioner of Income-tax, Bengal,* (1930) 5 I.T.C. 154: I.L.R. 58 Cal. 999 followed, L.C.T.S.P. *Subramanian Chettiar* v. *Commissioner of Income-tax, Madras,* (1935) 9 I.T.C. 47 explained.

Where the assessee's *aduthal* made certain remittances to a relation of his in a native state by means of hundis drawn by a Banking Corporation in Kaulalampur, F.M.S., on its branch in a native state within India and it turned out from the account books, that the payee had deposited some amount with the assessee's business firm in Burma, when Burma formed part of British India, on the question whether, inasmuch as by these remittances the assessee's liability to the payee had been reduced, the money should be deemed to have been received in British India,

Held, that the amount remitted was wrongly included in the total income, inasmuch as the payee was paid by a hundi delivered to her outside British India and cashed by her outside British India and the money never came into British India.

Reference under S. 66 (2) of the Indian Income-tax Act (XI of 1922) by the Commissioner of Income-tax, Madras.

K. V. Sesha Aiyangar for Petitioner,

P. R. Srinivasan for Respondent.

The Court delivered the following

Leach, C.J.

JUDGMENTS. *The Chief Justice.*—The assessee in this case is the manager of a Hindu undivided family residing at Kanadukathan in the Ramnad District. The family derives income from property and business in money-lending at Kanadukathan and also at Okkan in Burma and Klang and Malacca in the Federated Malay States. For the year of assessment 1936-37, the petitioner returned a loss of Rs. 13,828. The Income-tax Officer, having examined the accounts and considered the evidence produced in support of the return, assessed the family on an income of Rs. 14,651 which was subsequently reduced by the Assistant Commissioner to Rs. 10,833. The assessee was dissatisfied with the assessment and asked the Commissioner to refer certain questions of law to this Court for decision under S. 66 (2) of the Indian Income-tax Act (XI of 1922). In accordance with his request, the Commissioner of Income-tax has referred to this Court the following questions:

"(1) Was there any material before the Assistant Commissioner to justify his conclusion that the headquarter profits could not properly be deduced from the headquarter accounts and that an estimate was therefore necessary.

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(2) Whether on a proper construction of S. 4 (2) the following sums were rightly included in the petitioner's total income, namely,

(*a*) $. 5,165 being the amount credited to the folio of K.S. P.L. S.T.

(*b*) $. 6,290 being the amount debited to the M.V.K. account.

(*c*) Rs. 1,000 being the amount utilised for the purchase of shares in the Udumalpet Sri Venkatesa Mills Ltd."

The assessee is now content to have the first question answered in the affirmative. He has also given up his contentions with regard to the sum of $. 5,165, referred to in cl. (*a*) and the sum of Rs. 1,000 referred in cl. (*c*) of the second question. He has confined his case entirely to the question whether the $. 6,290 referred to in cl. (*b*) of the second question should have been included in the total income of the family.

The aduthal at the Malacca branch of the assessee's family business is one M.V.K. Palaniappa, whose mother, M.V.K. Sigappi Achi, resides in a village in the state of Pudukotta, which is outside British India. In order to defray his marriage expenses, he borrowed Rs. 10,000 from the Malacca branch and remitted the amount to his mother in Pudukotta. The Income-tax Officer refused to accept the statement of the assessee that this remittance represented a loan to the aduthal, but the statement was accepted by the Assistant Commissioner on appeal. On the 9th February 1936, the sum of $. 5,000 was remitted from Malacca to Sigappi Achi. This remittance was made by a hundi drawn by the M.C.T.M. Banking Corporation Ltd., of Kaulalampur on its branch at Pudukotta. On 23 March, 1936 a further sum of $. 1,290 was remitted to Sigappi Achi in the same way. These two sums of $. 5,000 and $. 1,290 make up the $. 6,290 now in dispute. The Income-tax authorities have held that these monies represent remittances from the Malacca branch out of the profits made there during the account year 1935-36 and they maintain that the $. 6,290 must be taxed on that footing. Their contention is based on the fact that Sigappi Achi had deposited with the assessee a sum of Rs. 19,692, which was utilised by the Okkan branch of the business and was credited to her in the books of that branch. In the year of account Burma was part of British India. It is said that inasmuch as the liability of the assessee to Sigappi Achi has been reduced by $. 6,290, it must be taken that this money has come into British India.

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This contention cannot be accepted. It is true that these remittances were paid for from out of the profits which had accrued to the Malacca branch; but the moneys were never received in British India. They were paid direct to Sigappi Achi in Pudukottah and it is not suggested that Sigappi Achi transferred the money to the assessee in British India. Unless profits made abroad are received in British India there can be no question of taxation here. It seems to me that the decision in *Multanchand Johurmull* v. *Commissioner of Income-tax, Bengal*,[1] is directly in point. Mr. K. V. Sesha Aiyangar on behalf of the Commissioner of Income-tax, has suggested that the case is governed by the decision of this Court in *L.C.T. S. P. Subramanian Chettiar* v. *Commissioner of Income-tax, Madras*[2] but the facts in that case were entirely different from the facts of the present case. There the creditor and the debtor both resided in British India and the creditor was paid by a hundi delivered to him in British India. Sigappi Achi was paid by a hundi delivered to her outside British India and cashed by her outside British India and the money never came to British India. For these reasons, I consider that the $. 6,290 was wrongly included in the assessee's total income and I would answer the reference in that sense.

As this opinion is shared by my learned brothers there will be an order for costs in favour of the assessee for Rs. 250. There will also be a refund of the deposit.

King, J. Krishnaswami Aiyangar, J.

King, J:—I agree.

Krishnaswami Aiyangar, J:—I agree.

K.C. —— *Reference answered.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, AND MR. JUSTICE HAPPELL.

Sree Rajah Venkata Ramayya Appa Rao Bahadur, Zamindar Garu of Nuzvid. ... *Appellant**

v.

The Secretary of State for India in Council represented by the Collector of Kistna. ... *Respondent.*

Appa Rao Bahadur v. Secretary of State for India.

1. (1930) 5 I.T.C. 154: I.L.R. 58 Cal. 999.
2. (1935) 9 I.T.C. 47: 69 M.L.J. 844 (F.B.).

* L. P. A. No. 21 of 1939. 12th December, 1940.

Appa Rao Bahadur *v.* Secretary of State for India.

Madras Local Boards Act (XI of 1920), Ss. 74-B, 78 and 79—Tank containing fish—Liability of owner for land cess—Annual rental value of fishery as basis.

The land which holds a tank in which there are fish has a rental value because the right to catch fish can be let. If the owner of the tank merely sells the right to catch for a period without any right in the purchaser to use for this purpose the bed of the fishery the purchaser cannot be deemed to be in occupation of the land which holds the fishery, and in such circumstances the beneficial occupation of the land will still be in the land-holder. Hence he will be liable to land cess calculated on the annual rental value of the fishery under Ss. 74-B and 78 of the Madras Local Boards Act.

Appeal under Cl. 15 of the Letters Patent against the judgment of the Hon'ble Mr. Justice Wadsworth dated the 25th January, 1939, and passed in S. A. No. 161 of 1935 (Reported in (1939) 1 M.L.J. 780) preferred against the decree of the Court of the Subordinate Judge of Bezwada in A. S. No. 12 of 1934 preferred against the decree of the Court of the District Munsif of Bezwada in O. S. No. 558 of 1932.

Y. Govindarajulu for Appellant.

The Government Pleader (*B. Sitarama Rao*) for Respondent.

The judgment of the Court was delivered by

Leach, C.J.

The Chief Justice.—The question involved in this appeal is whether the appellant as the owner of a tank in which there are fish is liable to land cess under the Madras Local Boards Act, 1920. The appellant let the right to catch the fish in the tank, whereupon the Collector of Kistna called upon him to pay land cess based upon the annual value of the fishery. Having been compelled to pay the sum demanded the appellant filed a suit to recover the amount with interest. There were other demands which the appellant had met under protest and the appellant asked for the repayment of all the sums recovered from him. The District Munsif of Bezwada who tried the suit held that it did not lie, and accordingly dismissed it. On appeal to the Subordinate Judge it was held that the appellant was not liable to pay land cess in respect of the fishery, but that he was liable for the other demands made by the Collector. In S. A. No. 161 of 1935 the Government appealed against that part of the judgment of the Subordinate Judge in which it was held that the appellant was not liable to be assessed to land cess in respect of the fishery, and the appellant appealed in S. A. No. 177 of 1935 against the rest of the judgment of the

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Subordinate Judge. Both the appeals were heard by Wadsworth, J., who allowed the appeal filed by the Government, but dismissed that filed by the appellant. He granted a certificate in the former appeal, but refused a certificate in respect of S. A. No. 177 of 1935 and therefore the present appeal is only concerned with the appellant's case so far as it concerns the fishery.

S. 74-B of the Madras Local Boards Act, 1920, states that a land cess being a tax on the annual rent value of lands, shall be levied in accordance with the provisions of the Act. S. 78 says that the land cess shall be levied on the annual rent value of all 'occupied' lands on whatever tenure held, and S. 79 (*iii*) makes the landholder or the sub-landholder of a zamindari land liable to pay the land cess. The tank with which this appeal is concerned admittedly lies in the zamindari land of the appellant. It is quite clear from S. 78 that the land cess can only be levied in respect of lands which have a rental value. It has been said that the right to catch fish is an incorporeal hereditament, and that the Madras Local Boards Act does not permit of land cess being levied in respect of such a right, but it is admitted, that if the appellant is the occupier of the bed of this tank and the bed has a rental value the order of the Collector is correct.

The reasons given by the learned Judge for holding that the appellant is liable to land cess are these. The leasing of a fishery in England normally implies the grant of a right to catch fish with rod and line or with net in a river or a permanent sheet of water, but the leasing of a fishery in a South Indian tank involves nothing of the kind. He says that ordinarily the land is dry for a portion of the year and the fish, though they are denizens of the water in the cold weather are denizens of the land and the mud in the hot weather 'for they go down into the mud when the tank goes dry.' The fish are caught when the water has almost gone and the fisherman drives the fish into a shallow muddy depression and catches them with his hands. Therefore, the tank is essentially land, though to some extent covered with water for a considerable part of the year.

I am unable to agree with the learned Judge that this description of a South Indian tank can be taken to have universal application so far as the Province of Madras is concerned. Some tanks may become dry owing to their shallowness, but

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many tanks in South India in which there are fish do not go dry and in such cases this method of catching fish cannot of necessity be resorted to. Moreover, there is no evidence on the record that this particular tank becomes dry in hot weather, and the court cannot decide the appeal on the basis that it does. At the same time I am of the opinion that the judgment can be supported on other grounds.

The learned Judge did not think it was necessary to refer to English law, but it is manifest that the English law of rating can usefully be referred to for the purpose of deciding this appeal. By the Poor Relief Act, 1601, occupiers of "lands, houses, tithes impropriate, propriations of tithes, coal mines, or saleable underwoods" were liable to be taxed for the relief of the poor. Under the Statute of Elizabeth the holder of an incorporeal hereditament was not liable to the tax, and it was not until the Rating Act, 1874, that the right of fowling, shooting, taking or killing game or rabbits, or fishing (referred to in the Act as a right of sporting) came within the rating law. Before the passing of this Act the land on which there was a fishery was assessable, but the owner paid the poor rate as the occupier of the land. By the passing of the Act of 1874 the owner of the land was assessable on the value of the land, if he had not parted with the right of sporting, but if he had severed the right of sporting from the occupation of the land, either he or the lessee could be rated as the occupier. There has been no such legislation in India and the appellant can only be assessed to land cess if he is in occupation of the bed of the tank within the meaning of the Act of 1920 and it has a rental value. There can be no doubt that the land which holds a tank in which there are fish (that is fish in quantity) has a rental value because the right to catch fish can be let. If the owner of the tank merely sells the right to catch for a period without any right in the purchaser to use for this purpose the bed of the fishery the purchaser cannot be deemed to be in occupation of the land which holds the fishery. In such circumstances the occupation of the land must still be in the landholder.

In the *Liverpool Corporation* v. *Chorley Union Assessment Committee and Withnell Overseers*[1], the Court of Appeal had to consider whether a municipal corporation was in occupation

1. (1912) 1 K.B. 270.

of land forming the catchment area of its water supply, the land being used for no other purpose. It was held that the use of this land for this purpose was sufficient to make the land assessable to poor rate. Vaughan Williams, L.J., said:

"I assume, in accordance with the observations of Lord Atkinson in *Winstanley* v. *North Manchester Overseers*[1], that, although the ownership of a hereditament does not necessarily imply occupation for the purpose of rating, and although a person or company may be an occupier within the meaning of the Statute of Elizabeth who has no proprietary interest in the soil, as was decided in *Holywell Union Assessment Committee* v. *Halkyn Drainage Co.*,[2] yet owners in possession are *prima facie* occupiers—'in possession' there does not mean physical possession, it means who are in possession by title—unless it be shown that the occupation is in some one else; *see* per Buller, J, in *Rex* v. *Mayor of London*[3]."

In the same case Buckley, L.J., said:

"The fact that the alleged occupier is not physically upon the property either in person or by works done or chattels placed upon the property is not necessarily the test. . . . An owner who retains property in land, and gets benefit from it, is rateable to the extent of that benfit (per Blackburn, J., in *Harter* v. *Salford Overseers*[4]."

That case went to the House of Lords and the judgment of the Court of Appeal was upheld: *Liverpool Corporation* v. *Chorley Union Assessment Committee*[5]. The judgment was delivered by Lord Atkinson who referred to *Rex* v. *Mersey and Irwell Navigation & Co.*[6], in this connection and said:

"In the first mentioned case"—*Rex* v. *Mersey and Irwell Navigation & Co*[6].,—"the undertakers, the respondents, were empowered by statute to deepen and straighten the bed of portions of the rivers Irwell and Mersey so as to make them navigable. The exclusive right (a most valuable one) of navigating the portions of these rivers where those works were effected was conferred upon them, subject only to this, that the riparian owners of land abutting on the streams had also the right to navigate the rivers, but only with pleasure boats. The respondents had acquired for the purpose of this navigation certain towing paths and locks in respect of which they were admittedly rateable. The point at issue was whether they were also rateable as occupiers of the subaqueous soil, the bed of the river. They were held not to be so, because they were not the owners of the bed and soil, but only entitled to an easement over it. It is quite clear, however, from the judgments of Bayley, J, and Parke, J., that, had they been owners of the bed and soil, they would have been held to be rateable as the occupiers of it, though the only way in which they used the soil was to navigate the waters lying above it."

I fail to see any difference in principle between that case and the present one. Lord Atkinson here clearly indicated that

1. (1910) A.C. 7.
2. (1895) A.C. 117 at 121.
3. (1790) 4 T.R. 21: 100 E.R. 872.
4. (1865) 6 B. and S. 591, 597: 122 E.R. 1313.
5. (1913) A.C. 197.
6. (1829) 9 B. and C. 95: 109 E.R. 36.

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if those who had the right to navigate the river had been the owners of the bed they would have been in occupation of the land forming the bed for the purpose of assessment to the poor rate. In the present case the appellant is admittedly the owner of the bed of the tank and the right to the fish in the tank is his. Therefore it seems to me that there is no escaping the conclusion that the appellant is in beneficial occupation of the land forming the bed of his tank and that the Collector was acting in accordance with law in levying land cess on the value of the land, which is to be gauged by the value of the right to fish in the water lying above the land.

For these reasons the appeal fails and must be dismissed with costs.

B. V. V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice,* AND MR. JUSTICE KRISHNASWAMI AIYANGAR.

Cheriyath Manayil Paru Amma (dead) and another .. *Appellants**

v.

Kannamkot Kelu Kurup .. *Respondent.*

Paru Amma v. Kelu Kurup.

Transfer of Property Act (IV of 1882), Ss. 76 (h) and 77—Mortgagor and Mortgagee—Mortgage of lessee's interest—Payment of rent—Inaction of lessor in recovering arrears—Mortgagee and not mortgagor entitled to benefit.

The lessee's interest in certain agricultural land was mortgaged for a certain sum of money which was made repayable at the end of three years, The deed provided that the mortgagee should remain in possession of the property and enjoy the profits in lieu of interest, but he was to pay the rent due to the lessor, and at the end of three years the mortgagor was to regain possession of the property on repayment of the principal sum. The lessor allowed the rent to fall into arrears for seventeen years and then sued for the recovery of the possession of the property and the amount of the arrears, making both the mortgagor and the mortgagee parties A decree was passed in his favour but as the result of his inaction he lost all right to the property and to the arrears of rent. Subsequently the representative in interest of the mortgagor filed a suit for redemption of the mortgage and also claimed to be entitled to set off the amount which the mortgagee ought to have paid to the lessor by way of rent.

Held, that the effect of the document was to take the mortgage entirely out of the purview of S. 76 (*h*) of the Transfer of Property Act and as the lessor did not insist on the payment of the rent his inaction enured to the benefit of the mortgagee and not of the mortgagor, and that the arrears

* L. P. A. No. 68 of 1939. 12th November, 1940.

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of rent could not be set off as against the mortgage money payable by the mortgagor.

Immani Seshayya v. *D Lakshminarasimham Rao Pantulu*, (1929) 57 M.L.J. 800, distinguished.

(1940) 1 M.L.J. 693, reversed.

Appeal under Cl. 15 of the Letters Patent against the judgment and decree of the Honourable Mr. Justice Patanjali Sastri in S. A. No. 550 of 1936[1] preferred to the High Court against the decree of the Court of the District Judge of North Malabar in A. S. No. 119 of 1935 (O. S. No. 731 of 1933, District Munsif's Court, Payoli).

K. P. Ramakrishna Aiyar for Appellants.

C. S. Krishnamurthi Aiyar, C. M. Balakrishnan and *V. P. K. Nambiar* for Respondents.

The judgment of the court was delivered by

Leach, C. J.

The Chief Justice.—This appeal arises out of a suit for the redemption of a usufructuary mortgage created on the 25th January, 1894 by the respondent's predecessor-in-title in favour of the appellant's predecessor-in-title. The respondent's predecessor-in-title was the lessee of certain agricultural lands situate in the District of North Malabar. The mortgage was of the lessee's interest in the land. The sum advanced by the mortgagee was Rs. 164, which was to be repaid at the end of three years. The deed provided that the mortgagee should remain in possession of the property and enjoy the profits in lieu of interest, but he was to pay the rent due to the lessor. At the end of the three years the mortgagor was to regain possession of the property merely on the repayment of the principal amount of Rs. 164. The lessor appears to have been a most complacent landlord because he allowed the rent to fall into arrears for 17 years, but then he filed a suit for the recovery of the possession of the property and the amount of the arrears, making both the mortgagor and the mortgagee parties. On the 18th April, 1910 a decree was passed in his favour, but he made no attempt to execute it, and as the result of his inaction he lost all right to the property and to the arrears of rent.

In 1933 the respondent as the representative in interest of the mortgagor, filed the present suit for redemption of the mortgage and he claimed to be entitled also to the amount

1. (1940) 1 M. L. J. 693.

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which the mortgagee ought to have paid to the lessor by way of rent. He maintained that an account should be taken of the rents which had not been paid and that the amount found should be set-off against the mortgage loan; any balance in his favour to be paid to him. In other words he claimed that he was entitled to a decree for redemption with an order for a monetary payment in his favour. The District Munsif held that the appellant should give credit to the respondent for all the moneys he ought to have paid by way of rent during the 17 years but failed to pay, and granted a decree for redemption on this basis. The appellant appealed to the District Judge of North Malabar, who reversed the decision of the District Munsif. On appeal to this court by the respondent, Patanjali Sastri, J., restored the decision of the District Munsif, but granted a certificate permitting of the present appeal under cl. 15 of the Letters Patent.

The learned Judge considered that the respondent was entitled to credit for the unpaid rents by virtue of the provisions of S. 76 (*h*) of the Transfer of Property Act, there being in his opinion no contract to the contrary within the meaning of S. 77. S. 76 states what shall happen when during the continuance of the mortgage the mortgagee takes possession of the mortgaged property. Cl. (*h*) of the section provides that the mortgagee's receipts from the mortgaged property shall, after deducting the expenses properly incurred for the management of the property and the collection of rents and profits and other expenses mentioned in cls. (*c*) and (*d*) and interest thereon, be debited against him in reduction of the amount, if any, from time to time, due to him on account of interest, the balance being applied in reduction or discharge of the mortgage money. If there is any surplus it is to be paid over to the mortgagor. S. 77 states that nothing in S. 76, cls. (*b*) (*d*) (*g*) and (*h*) applies to cases where there is a contract between the mortgagee and the mortgagor that the receipts from the mortgaged property shall, so long as the mortgagee is in possession of the property be taken in lieu of interest on the principal money or in lieu of interest and defined portions of the principal.

We are unable to accept the opinion of the learned Judge that the contract does not deprive the mortgagor of the benefit of cl. (*h*) of S. 76. In our opinion the mortgage deed allowed the mortgagee to go into possession and make what he could

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out of the property, subject to meeting the landlord's demands for rent and the right of the mortgagor at the end of the period to redeem on payment of the bare amount of principal. We consider that the effect of the document is to take the mortgage entirely out of the purview of S. 76 (*h*) and as the lessor did not insist on the payment of the rent his inaction enured to the benefit of the mortgagee, not of the mortgagor.

The learned Judge placed great reliance on the decision of this court, in *Immani Seshayya* v. *D. Lakshminarasimha Rao Pantulu*[1], but we can see nothing in common in the two cases. In *Immani Seshayya* v. *D. Lakshminarasimha Rao Pantulu*[1], there was a usufructuary mortgage and it was calculated that the annual profits from the land would be Rs. 240. The deed provided that the mortgagee should pay annually Rs. 100 for revenue and village expenses, retain Rs. 80 on account of the mortgage debt and pay the balance of Rs. 60 to the mortgagor. The deed also provided that if the lender failed to pay the Rs. 60 he was bound to relinquish a proportionate part of the land. The mortgagee failed to pay the Rs. 60 annually to the mortgagor and it was held that the mortgagor was entitled to be given credit for the total amount which he ought to have received. Clearly the mortgagor was entitled to be credited with the sums which the mortgagee ought to have paid him when it was being calculated what the mortgagor owed the mortgagee. In the course of the judgment the following observations were made:

"Let us suppose that the revenue on this land had been remitted by the Zamindar and the sum representing that revenue had annually been left in the hands of the defendant. Can it be successfully maintained that it is not a part of the usufruct, which the mortgagee was bound to adjust against the mortgage debt? Clearly not. The same principle applies to the facts of the case."

The learned Judge has expressed the opinion that this passage puts in substance the position in the present case, but again we are unable to agree. The passage just quoted would have application if there were not a contract to the contrary within the meaning of S. 77, but there is a contract to the contrary in this case and that makes all the difference.

For the reasons indicated we allow the appeal with costs throughout.

B. V. V. —— *Appeal allowed.*

1. (1929) 57 M.L.J. 800.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE HORWILL.

M. Thiruvengadamudayanaiya .. *Appellant** (*Plaintiff*)

v.

R. Narasimhaswamiaiya and others. *Respondents* (*Defendants*).

Thiruvengadamudayanaiya *v.* Narasimhaswamiaiya.

Deed—Construction—Endowment for religious and charitable purpose—Income partly applied—Residuary legatee directed to take surplus—Property merely charged for charitable uses.

The testatrix provided by her will that the residuary legatee, whom she described as her daughter by affection, should reside in a portion of the demised house and she further provided that the remaining portions of the said house should be let on rents and the same utilised for conducting certain festivals in two temples and for a charity. She further provided that the remainder left after deducting the charity expenses should be given to the residuary legatee. Another clause of the will contained a prohibition against alienation of the said property by her executor or other relations. It appeared that the surplus income from the property was far greater than what was required to comply with the directions of the testatrix with regard to the religious and charitable purposes.

Held, that under the circumstances the proper inference was that the property was merely charged to charitable uses and that the residuary legatee took the property subject to the charge.

Ashutosh Dutt v. *Doorga Churan Chatterjee*, (1879) L.R. 6 I.A. 182: I.L.R. 5 Cal. 438 and *Har Narayan* v. *Surja Kumwari*, (1921) L. R. 48 I. A. 143: I.L.R. 43 All. 291 (P. C.), referred to.

Appeal against the decree of the City Civil Court at Madras dated the 14th August, 1939, and made in O. S. No. 2891 of 1939.

A. Suryanarayaniah for Appellant.

R. Kesava Aiyangar for Respondent.

The judgment of the court was delivered by

Leach, C. J. *The Chief Justice.*—The sole question involved in this appeal is whether under the will of one Ramanujakootam Mangamma who died on the 8th August, 1914, there was a dedication to charity of certain immovable property or whether the property was merely charged to charitable uses. Paragraph 3 of the will reads as follows:

"I having up to now treated as daughter by affection and brought up Manchukonda Nanugannamma, alias Alamelumangathayaramma, daughter of my deceased younger sister Dachepalli Andalamma, she and her descendants shall take possession of and reside free of rent in one kitchen downstairs

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* C. C. C. A. No. 54 of 1939. 22nd August, 1940.

Thiru-vengada-mudaya-naiya. v. Narasimha swamiaiya. Leach, C.J.

and the two rooms upstairs on the eastern side and the halls attached thereto in house No. 25, Venkatachalla Mudali Street. The remaining portion of the said house shall be let on rents and the rents realised shall be utilised for services in the manner described below:

(a) for the Brahmotsavam festival of Sri Venkateswara on the hills in the Tirupati Devasthanam, Rs. 100 per year;

(b) Feeding 25 Vaishnavas on every Dwadasi day in the Bairagimatam or otherwise known as Thiruvengadamudayan temple, Madras, and

(c) Dosaipadi service on every Ekadasi and Amavasai days (eleventh day of the forthnight and new moon days) in Sri Chenna Kesava Perumal temple, Devaraja Mudali Street, Madras."

The property in suit is the property referred to in this paragraph and what the Court has to decide is whether Nanugannamma, who has been referred to in this appeal as the residuary legatee, takes the whole property subject to a charge in favour of the charities set out in the paragraph or whether there is a complete dedication to charity of that portion of the house which was not set apart for the residence of Nanugannamma.

Having made these provisions the testatrix goes on to direct her executors to sell another property owned by her, namely No. 16, Varadayya Street, Madras, and, after paying her debts to give one half of the balance to the residuary legatee and the other half to the head of the Tirupati Jeer Matam in Tinnanore for the purpose of "daily feeding" in the Mutt. After disposing of her jewels and household articles the testatrix provides that the remainder left after deducting the charity expenses "as detailed above" shall be given to the residuary legatee. The charity expenses 'detailed above' admittedly refer to the charity expenses set out in cl. 3 of the will.

Another clause of the will which has been referred to in the arguments is cl. 7, which reads as follows:

" Neither my gnatis nor the executors nor any other kind of relations have any right or title whatever to make gift etc., or sale or to create mortgage in respect of the aforementioned house No. 25, Venkatachalla Mudali Street so long as sun and moon may last."

The suit was tried by the Additional Judge of the City Civil Court, who came to the conclusion that there was no dedication of the property No. 25, Venkatachalla Mudali Street to charitable uses, but only of the income. It is common ground that the rents accruing from that property will provide far more than is necessary to meet the expenses of the charities. According to the appellant the gross income is Rs. 1,200; according to the respondent it is Rs. 1,400, but they are both

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agreed that not more than Rs. 350 will be required to comply with the directions with respect to charity contained in paragraph 3 of the will.

In *Har Narayan* v. *Surja Kunwari*[1], the Privy Council had to consider a case where a testator directed that his property should be considered to be the property of a certain idol, but went on to provide that:

"Whatever may be saved after defraying the expenses of the temple and the pay of the servants shall be used by our legal heirs to meet their own expenses."

Lord Shaw in delivering the judgment of the Judicial Committee observed:

"In such cases no fixed and absolute rule can be set up, derived alone from the use of particular terms in one portion of the will. The question whether the idol itself shall be considered the true beneficiary, subject to a charge in favour of the heirs or specified relatives of the testator for their up-keep, or that, on the other hand, these heirs shall be considered the true beneficiaries of the property, subject to a charge for the up-keep, worship and expenses of the idol, is a question which can only be settled by a conspectus of the entire provisions of the will."

In that case, as in the present one, the income of the property was considerably in excess of what was required for the worship and maintenance of the temple. Lord Shaw quoted a passage from the judgment of Turner, L.J., in *Sonatan Bysack* v. *Sreemutty Juggutsundree Dossee*[2], where Turner, L.J., said that:

"Although the will purports to begin with an absolute gift in favour of the idol, it is plain that the testator contemplated that there was to be some distribution of the property according as events might turn out and that he did not intend to give this property absolutely to the idol seems to their Lordships to be clear from the directions which are contained in various clauses of the will."

On this line of reasoning the Board held in *Har Narayan* v. *Surja Kunwari*[1], that the intention was that the heirs should take the property subject to a charge for the performance of the religious purposes named.

In *Ashutosh Dutt* v. *Doorga Churn Chatterjee*[3], the Privy Council had to consider a Hindu will which has much in common with the will now under consideration. The operative parts of the will opened as follows:

"I dedicate the auction-purchased property No. 3496, Lot Panchgatchia, Pargana Baligori, Zilla Hooghly, standing in my name, to the Thakur Ishwar Raj Rajeswar that is in my house. And the Sarodia Pooja and other ceremonies that are being performed in the house will be performed as

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1 (1921) L.R. 48 I.A. 143: I.L.R. 43 All. 291 (P.C.).
2. (1859) 8 M.I.A. 66. 3. (1879) I.L.R. 5 Cal. 438: 6 I.A. 182 (P.C.).

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hitherto. After all these acts have been observed from the proceeds of the said property, if there be a surplus in the profits then the family will be supported therefrom."

After appointing the executors the testatrix said:

" After your death he who is my heir for the time being will be the executor of this will. Beyond performing the aforesaid worship of the *deb* and the ceremonies and poojas, none of my heirs shall have any interest in or profit from my property. And they will have no power of gift or sale over it. And it will not be attached or sold on account of their debts."

It was held that there was here a bequest of the surplus to the members of the family for their own use and benefit and that each of the sons of the testatrix took a share in the property after satisfying the religious and ceremonial trusts. With regard to the prohibition against gift or sale Sir Barnes Peacock, who delivered the judgment of the Board, pointed out that this direction being inconsistent with the interest given was beyond the power of the testatrix and must be rejected as having no operation.

Now, what is the position here? The will provides that a portion of the property which was not to be occupied by the residuary legatee should be let and the rents utilised for specific purposes, but later the testatrix provides that the surplus shall go to the residuary legatee. The amount of the surplus was and is far greater than what is required to comply with the directions of the testatrix with regard to religious charities. It is also to be observed that the testatrix had no children of her own and she had brought up the residuary legatee as her daughter. As a matter of fact she described her in the will as her "daughter by affection". And the prohibition against alienation must be ignored as the Privy Council indicated in *Ashutosh Dutt* v. *Doorga Churn Chatterjee*[1].

In these circumstances we are of opinion that the learned trial Judge came to the correct conclusion in holding that the property was taken by the residuary legatee subject to a charge. Consequently the appeal will be dismissed with costs.

B. V. V. *Appeal dismissed.*

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1. (1879) I.L.R. 5 Cal. 438: 6 I.A. 182 (P.C.).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

Sankhavarm Naligindla Venkata Rangacharyulu .. *Petitioner.** (*Defendant*)

v.

Rangasubba Akkappa Rao .. *Respondent.* (*Plaintiff*)

Venkata Ranga-charyulu *v.* Akkappa Rao.

Guardian and Wards Act (VIII of 1890), S. 48—Guardian of property of minor—Judgment appointing guardian—Attack on judgment as obtained by collusion—Whether open to the plaintiff in a suit against minor—Appeal or revision alone maintainable—Evidence Act (I of 1872) S. 44—Effect of.

Where rightly or wrongly a Court had held that it was desirable to appoint a property guardian for a minor and made such an appointment, S. 3. of the Indian Majority Act was brought into operation and the minority of the ward was prolonged,

It was not open to a creditor suing the minor on a promissory note to get round the provisions of S. 48 of the Guardian and Wards Act by showing that the appointment of the guardian was procured by collusion and that the minority of the ward ought not to have been extended.

Subramaniam Chetty v. *Doraisingam Tevan,* 24 M.L.J. 49 explained and distinguished.

In the absence of an express power to attack the judgment under S. 44 of the Evidence Act it could not be attacked on grounds of collusion under the general law. S. 48 of the Guardian and Wards Act barred any contest regarding the validity of the judgment appointing the guardian except by procedure of appeal or revision.

Petition under S. 115 of Act V of 1908 praying that the High Court will be pleased to revise the decree of the District Court of Kurnool dated the 20th October 1938 and passed in A. S. No. 61 of 1938 preferred against the decree of the Court of the District Munsif of Nandyal in O. S. No. 10 of 1937 dated the 31st March, 1938.

A. C. Sampath Aiyangar for Petitioner.

A. V. Seshaiya for Respondent.

The Court delivered the following

JUDGMENT.—The petitioner was the defendant in a suit on a promissory note and he put forward the defence that on the date when the suit promissory note was executed he was a minor by reason of the fact that a guardian of his property was appointed in August, 1930, so that by the force of S. 3 of the Indian Majority Act his minority was extended beyond the date on which the suit promissory note was executed.

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*C. R. P. No. 644 of 1939. 18th December, 1940.

Venkata Ranga-charyulu v. Akkappa Rao.

The courts below permitted the plaintiff to meet this contention by showing that the appointment of the guardian was obtained by collusion between the minor's relatives and it has been held that this order is consequently void as against the plaintiff, so that the plaintiff can treat the defendant as still a major in spite of the courts' order which has the effect of making him a minor. I may say at once that the basis for the finding of the courts below that this guardianship order was obtained by a fraud on the court seems to me of doubtful legality. The facts found are that the minor's property was being adequately managed by his mother, that the minor was not shown to have squandered that property, that the person appointed as his guardian was not a suitable person to control his property because he lived in another village, that the property guardian did not actually function as such and subsequently became an insolvent, that notwithstanding the appointment of a guardian the minor borrowed money after his guardian was appointed and that there are indications that the motive which led the relatives to agree to the appointment of a guardian was to get rid of two debts contracted by the mother on behalf of the minor. Some of these findings of fact are not beyond challenge, but, for the purpose of these proceedings, they may be taken as conclusive. But on these findings I doubt very much whether the court would be justified in coming to the conclusion that this guardianship order was obtained by a fraud on the court. There is no proof of fraud on any particular creditor. It does not appear that the persons who had advanced money to the mother of the minor were actually defrauded. It may well be that the relatives agreed that it was desirable to extend the minority of the minor in order to prevent him from wasting his property by borrowing, but I am unable to see that this motive is sinister as it appeared to the courts below, and the fact that the minor subsequently did borrow money is just as much an indication of the necessity for the appointment of a guardian as it is an indication that the relatives wanted to facilitate fraudulent borrowing. The subsequent insolvency of the property guardian and his failure to perform his duties seem to me entirely irrelevant considerations for the purpose of deciding whether the guardianship order was or was not obtained by fraud. Taking all the findings of fact together, it seems to me that there were no proper materials upon which the court

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could legally conclude that the order appointing the guardian was obtained by a fraud on the court or by collusion with the object of defrauding other people. I may say that the admission into evidence of two previous judgments in which learned Judges express opinions as to the nature of these guardianship proceedings seems to me to have been improper. The plaintiff is not a party to these previous proceedings and it is difficult to see how the opinion of these Judges is relevant in the present proceedings.

In revision, however, I am not mainly concerned with the legality of the finding that this judgment was obtained by collusion. The main question is whether it is open to the plaintiff in order to enforce a debt contracted by a minor to show that the judgment which has the effect of making him a minor was obtained by collusion. In my opinion it is not. Both the courts below have treated the case as one coming under S. 44 of the Evidence Act, which is clearly inapplicable. S. 44 applies only to judgments etc., which are relevant under S. 40, 41 and 42. This order appointing a guardian certainly does not come under S. 40 or 42. Though it may well be said that a judgment appointing a guardian and extending the minority of the ward is somewhat analogus to those judgments *in rem* enumerated in S. 41, it is quite clearly not a judgment in the exercise of the probate, matrimonial, admiralty or insolvency jurisdiction of the court and it therefore does not fall under S. 41. The judgment in question is admissible under S. 43. S. 44 does not apply to judgments admissible under S. 43. Vide *Bisvanath Prosad Mahata* v. *Bhagwandin Pandey*.[1] In the absence of an express power to attack this judgment under S. 44 of the Evidence Act, we have to consider whether it is open to attack on grounds of collusion under the general law. It seems to me that S. 48 of the Guardian and Wards Act bars any contest regarding the validity of the judgment appointing the guardian except by the procedure of appeal or revision.

Counsel for the respondent has quoted the case of *Subramaniam Chetty* v. *Doraisinga Tevan*,[2] in support of the argument that a guardianship order can be attacked in collateral proceedings merely by showing, when the order is tendered in evidence, that it was obtained by collusion. As I read the case referred to, all that was decided there was that, when in

1. (1911) 14 C.L.J. 648. 2. (1912) 24 M.L.J. 49.

collateral proceedings it was sought to attack a finding of fact upon which an order for the discharge of a guardian was passed, though that order of discharge might not be amenable to attack with reference to S. 48 of the Guardian and Wards Act, the ward who is not a party to the fraud may allege that the court gave a wrong finding of fact by reason of the fraud of the parties to the guardianship proceedings. The case was one in which the guardian had procured his discharge by fraudulently misrepresenting to the court that the minor had come of age; and in the collateral proceeding it was held that the minor could show that this finding of fact was procured by fraud and that in fact he was still a minor. It seems to me that that decision does not provide authority for the view that in collateral proceedings it is open to a party who is seeking to escape the effect of an order against which no suit or other contest would lie under S. 48 to evade the effect of that order by showing that it was one which ought not to have been pronounced and which was in fact induced by fraud or collusion. Rightly or wrongly the District Court held that it was desirable to appoint a property guardian for this minor and made such an appointment. The effect of that appointment is to bring into operation S. 3 of the Indian Majority Act and to prolong the the minority of the ward. It is not in my opinion open to the plaintiff to get round the provisions of S. 48 of the Guardian and Wards Act by showing that the appointment of the guardian was procured by collusion and that the minority of the ward ought not to have been extended. His status has been established by an order which cannot be contested except by appeal or revision, and that status governs his legal relationships.

It has been suggested that the plaintiff can be allowed to support his claim by showing that money was in fact borrowed for the minor's necessaries so as to call in aid S. 68 of the Contract Act and I have been asked to frame an issue on this question and remit the suit for trial of that issue. It is, however, contended by the petitioner with some force that this involves the trial of a fresh suit on a different cause of action raising questions of limitation etc., which have not been gone into and that if the plaintiff, when the defendant put forward his minority desired to have a second line of resistance on the basis of S. 68 of the Contract Act, he should have got an issue framed in the trial court and not have waited till

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revision. It seems to me that this objection must succeed and that it is now too late to change the whole character of this suit. In the result, therefore, the revision petition is allowed with costs throughout and the plaintiff's suit is dismissed.

K. C. —— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

Tetali Surayya .. *Appellant** (*1st Plaintiff*)

v.

Karri Pedia Balakrishnayya and another. .. *Respondents* (*1st Defendant and 2nd Plaintiff*).

Hindu Law—Sulka—*Amount paid by bridegroom's father—Not in any sense payment for purchasing bride*—Stridhana *property.*

If a present is given to a girl or to the father of the girl for the primary purpose of purchasing a bride or securing the marriage then it would come within the definition of *sulka*; but these same classes of gifts, if not tainted with the idea of purchase, being simple gifts to a prospective bride, would not fall within the definition of *sulka.*

Where the Courts were satisfied from the evidence that the suit gift was not considered by the parties to be in any sense a payment for the bride without which the marriage could not take place,

Held, that the gift was not bride's price or *sulka* but ordinary Stridhana capable of passing to the bride's Stridhana heirs in the order of succession.

Appeal against the decree of the Court of the Subordinate Judge of Rajahmundry dated 16th August, 1937, and passed in Appeal Suit No. 44 of 1935 preferred against the decree of the Court of the District Munsif of Ramachandrapur dated 18th February, 1935, and passed in O. S. No. 71 of 1929.

Ch. Raghava Rao for Appellant.

C. Rama Rao for Respondents.

The Court delivered the following

JUDGMENT.—Just before the marriage of Bulli Venkamma her father was given Rs. 800 by her prospective husband's father for the purchase of jewels and *saree samans.* Now that she is dead there are two sets of claimants for the property that was purchased with this Rs. 800. They are her husband, the first defendant, who claims as the heir of his son, the second defendant, who died pending suit and who in his turn claimed

* S. A. No. 75 of 1938. 11th December, 1940.

as the *Stridhana* heir of his mother. The other claimants are the plaintiffs, who are the brothers of Bulli Venkamma, who say that this property was *sulka*, in which case the brothers are the persons first in the list of those entitled to succeed to that particular kind of *Stridhana* property. Both the courts below found that the property was not *sulka* and that consequently it descended to her son in the way that Stridhana property ordinarily does.

Surayya v Balakrishnayya.

Mr. Raghava Rao relies on the definition of *sulka* in the Smriti Chandrika, in which it is defined as wealth received as the price of household utensils, of beasts of burden, of milch cattle, or ornaments. In the Mitakshara, on the other hand, *sulka* is defined as a gratuity for which a girl is given in marriage, regarding which Trevelyan says in his third edition of his 'Hindu Law' at page 475:

"According to the more usual view, this was the gratuity for the receipt of which a girl is given in marriage. It was originally paid to the father as the price of the bride, but when that was forbidden the father received it for the bride, and it became her property, as her dowry."

Much the same is said of *sulka* in Ghose's Hindu Law Vol. I at page 331. Mr. Rama Rao, relying on the origin of this particular kind of property, contends that *sulka* is not a form of gift which pertains to the Brahma form of marriage and is given only in the *Asura* form. I do not however find any authority for this in the text books or in the original texts that have been cited to me. On the contrary, *sulka* is discussed in the text books with other forms of *Stridhana* property, and this distinction is not drawn. It would seem that when, instead of the father's receiving property for himself, he took it and gave it to the bride, it came to be regarded as unobjectionable by the ancient authorities and was therefore permitted even in connection with the Brahma form of marriage.

Mr. Raghava Rao emphasises the importance of the Smriti Chandrika in South India and argues that all kinds of property mentioned in the definition of *sulka* in the Smriti Chandrika must be considered as *sulka* when it is given before marriage into the hands of the father.

As to the relative value of the authority of the Mitakshara and the Smriti Chandrika, Mayne in his 'Hindu Law and Usage', p. 50, 10th edition, discusses a decision of the Judicial

Surayya v. Bala-krishnayya.

Committee in, *Buddha Singh* v. *Lattu Singh*[1]:

"The Judicial Committee, after pointing out that the Smriti Chandrika admittedly differs from the author of the Mitakshara in several essential rules of law, said "it seems, to say the least, doubtful whether an enunciation in the Smriti Chandrika can be safely applied except perhaps by way of analogy to explain a dubious or indeterminate phrase or term in the Mitakshara." In other cases, where its authority on specific questions in respect of inheritance to Stridhana was tested, its views were not followed. Again, while the Mitakshara gives the preference to the mother on the ground of propinquity, the Smriti Chandrika gives the preference to the father. The authority of the Smriti Chandrika must therefore be confined to questions where the Mitakshara is silent and the reasoning of the Smriti Chandrika is consistent with the rules in the Mitakshara. There can however be little doubt that its general authority is fairly high on points on which it does not come into conflict with the Mitakshara."

This quotation from Mayne seems to be in accordance with judicial decisions. It may be true that where the other authorities are unanimous and against the Mitakshara, they may be preferred, as apparently they were in *Debi Mangal Prasad Singh* v. *Mahadeo Prasad Singh*[2].

I do not think that it is necessary from a reading of the two definitions quoted above to posit a contradiction. It seems clear that even though we take the definition of *sulka* given in the Smriti Chandrika, we must still read it with the definition given in the Mitakshara and must regard as *sulka* the classifications given in the Smriti Chandrika only if there is attached to the gift some idea of a bride price. If the present is given to the girl or to the father of the girl for the primary purpose of purchasing a bride or securing the marriage, then it would come within the definition of *sulka*; but these same classes of gifts, if not tainted with the idea of purchase, being simple gifts to a prospective bride, would not fall within the definition of *sulka*.

The parties are *kapus*, a very orthodox sub-caste of sudras; and it is not contended that the practice in this particular case differed from the customary practice of the community. Nor is it said that there is any essential difference between the practice in this community and that prevailing among the twice-born castes. In fact, Mr. Raghava Rao goes so far as to say that all forms of dowry which are the subject of barter and which are actually given before the marriage

1. (1915) I.L.R. 37 All. 604.
2. (1912) 22 M.L.J. 462: L.R. 39 I.A. 121: I.L.R. 34 All. 234 (P.C.)

Suriyya *v.* Bala-krishnayya.

ceremony takes place would come under the classification of *sulka*. It is common knowledge that such presents are not ordinarily treated as such; but pass to the children after the mother's death in the same way as other forms of Stridhana. Evidence has been let in in the present case, including the evidence of two documents, Exs. II and III, of which the plaintiffs were writers or attestors, of two separate instances in which property of this nature has passed to the children and not to the heirs according to the succession for *sulka*. This is evidence that the parties do not regard such gifts as *sulka*. As to the presumption arising in such cases, I feel myself in accord with the learned author of Mayne's 'Hindu Law' who at page 755 when writing of *sulka* says:

> "The *sulka* in the older sense of bride price, ultimately received by the bride herself is obsolete; where it is now paid to the parents or the brother in the Asura marriage, it does not raise any question of succession to her Stridhana. Where it is paid to the bride herself, either as the price of ornaments or household furnishings or as a complementary present, it would be her ordinary Stridhana; for there is no reason why any dowry given to the wife by the husband in modern times should be treated as attracting a special order of succession which was applied to some obscure form of the ancient bride price, which the father may be supposed, after receiving, to have handed back to his daughter."

Both the courts below were satisfied from the evidence that the suit gift was not considered by the parties to be in any sense a payment for the bride without which the marriage could not take place. Mr. Raghava Rao contends that the lower courts did not try to read the definition given in the Smriti Chandrika with the definition given in the Mitakshara so as to reconcile them, and then to regard the evidence in the light of this combined definition. I think, however, that the lower courts had very clearly before them the essential nature of *sulka* and judged the evidence accordingly.

The appeal therefore fails and is dismissed with costs.

Leave refused.

K. C.　　*Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KING.

Muni Reddy *v.* Muni Reddy.

M. Muni Reddy .. *Appellant* (1st Respondent)*

v.

M. Muni Reddy .. *Respondent (Execution Petitioner).*

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* A.A.A. Order Nos. 116 and 118 of 1940.　　31st January, 1941.

Muni Reddy v. Muni Reddy.

Madras Debt Conciliation Act (XI of 1936), Ss. 14 and 18—Decrees obtained by non-consenting creditors before settlement—Right to execute against all the assets of the creditor—Certificate under S. 18—Effect.

Though the agreement under S. 14 (1) definitely prescribes what assets of the debtor shall be available for the creditors consenting to the conciliation, that is not enough to constitute a charge which is to be binding upon all the world and in particular upon the non-consenting creditors who have already obtained decrees. S. 18 deliberately excludes from its effect decrees obtained before the settlement by the Board. The Act imposes no obstacle against execution of such decrees against all the assets of the debtor including those earmarked by the settlement under S. 14 (1) for the benefit of those creditors who agreed to the settlement.

Appeal against the order of the District Court, Chittoor dated 11th April, 1940, and made in A. S. No. 102 of 1940 (E. P. No. 12 of 1940, in O. S. No. 16 of 1938, Sub-Court, Chittoor) etc.

K. Bhashyam Aiyangar and *T. R. Srinivasan* for Appellants.

B. C. Seshachala Aiyar, P. S. Ramachandran and *S. Venkatachalam* for Respondents.

The Court delivered the following

JUDGMENT.—These appeals involve the interpretation of certain sections of the Madras Debt Conciliation Act. The appellant is a debtor who made an application under the Act. He had ten creditors and of these ten, eight came to an amicable settlement with him, the eight representing more than one half of the total indebtedness of the appellant. Under S. 14 therefore the settlement was reduced to writing. The remaining two who refused to agree to the settlement already held decrees as evidence of the debts due to them from the appellant. A certificate was given to the debtor under S. 18. The recalcitrant creditors proceeded to execute their decrees and the question now is whether they are entitled to execute their decrees against the whole of the assets of the appellant, which amount to Rs. 5,125, standing to his credit in the Co-operative Central Bank, or whether they are to be confined to such portions of those assets as have not been earmarked by the settlement under S. 14 for the benefit of those creditors who agreed to the settlement. The learned District Judge has examined S. 18 of the Act and pointed out that it does not definitely deal with the situation now before us.

The effect of granting to the debtor a certificate that creditors have unreasonably refused to come to an amicable

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settlement with him are set out in sub-ss. (2) and (3) of S. 18. They deal with the refusal by the court to grant costs to any such creditor who afterwards sues for his debt or to grant any interest in excess of simple interest at six per cent. and with a restriction against the rights of such a creditor, when he has obtained a decree after the settlement, of proceeding against any of the assets set apart in the settlement until those creditors who agreed to the settlement have been fully satisfied. As the learned District Judge has pointed out, nothing is said in S. 18 about the position of a creditor who at the time of the settlement to which he refused to agree has already obtained a decree. It is argued in appeal that it was unnecessary to make any such provision in S. 18, as the effect of sub-s. (2) of S. 14 was to constitute a charge in favour of such property as is earmarked in the settlement. That sub-section enacts that an agreement made under sub-s. (1) shall within thirty days from the date of the making thereof, be registered under the Registration Act and it shall then take effect as if it were a decree of a Civil Court and be executable as such. Of course the agreement definitely prescribes what assets of the debtor shall be available for the creditors, but it does not seem to me that that is enough to constitute a charge which is to be binding upon all the world and in particular upon the non-consenting creditors who have already obtained decrees. If that were so, I feel sure that it would have been clearly expressed in the Act itself and not left to deduction from arguments. The very fact that S. 18 does deal with certain contingencies and not with others seems to me to be an indication that the contingencies not dealt with were deliberately excluded from the effect of the section. It would have been easy for the legislature to have enacted that where a Debt Conciliation Board was dealing with debts due to several creditors and was of the opinion that the scheme proposed by the debtor was a reasonable one which all the creditors ought to accept, then if a majority of the creditors accepted it, the scheme should be binding upon all the creditors. There is a provision of this nature, for instance, in S. 38 (2) of the Provincial Insolvency Act and the omission of any such provision in the Debt Conciliation Act is a very strong indication that those creditors who do not consent to the settlement are not to be adversely affected by their failure to consent in any other

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way than that laid down explicitly by the Act itself. I am accordingly of opinion that the learned District Judge has rightly held that the Act imposes no obstacle against the execution petitions of the respondents.

These appeals therefore fail and must be dismissed with costs.

Leave to appeal is refused.

K. S. —— *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

Mavarakkandy Achuthan Nayar .. *Petitioner* (Plaintiff)*

v.

Thanniyatuthil Achuthan Nayar .. *Respondent (Defendant).*

Achuthan Nayar v. Achuthan Nayar.

Limitation Act (IX of 1908), S. 25—Applicability—Promissory note bearing both English date and Malayglam date—Inconsistency—between the two—Computation of time for limitation—Evidence as to date of note—Admissibility—Evidence Act (I of 1872), S. 96.

A promissory note bore both the English date 16th November, 1934 and the Malayam date Thulam 30,1110, corresponding to 15th November, 1934. In a suit on the promissory note filed on 16th November, 1937,

Held, that S. 25 of the Limitation Act creates no presumption as to the date of a document but merely provides that periods of limitation shall be worked out according to the Gregorian calendar. The question as to the date of the promissory note is one of fact to be decided by evidence and probabilities according to S. 96 of the Evidence Act.

Petition under S. 25 of Act IX of 1887 praying that the High Court will be pleased to revise the decree of the Court of the District Munsif of Payyoli in S. C. S. 249 of 1937.

A. Achuthan Nambiar for Petitioner.

K. S. Sundaram for Respondent.

The Court delivered the following

JUDGMENT:—The suit promissory note bore two dates. The first was the Malayalam date corresponding to 15th November, 1934. The second was the English date 16th November, 1934. The suit was filed on the last day of limitation reckoned from the latter date and it has been held to be barred. It is contended that S. 25 of the Limitation Act applies and that only the English date can be looked to. As I read S. 25 it creates no presumption as to the date of a document but merely provides that periods of limitation shall be

* C.R.P. No. 1315 of 1938. 5th December, 1940.

Achuthan Nayar v. Achuthan Nayar.

worked out according to the Gregorian calendar. The question is after all a simple question of fact to be decided by evidence and probabilities according to S. 96 of the Evidence Act. Clearly there has been a mistake in the document and one of these two dates must be wrong. The only question is which date is wrong and there is no legal presumption in favour of either. The lower Court has come to the conclusion that it is more likely that the Malayalam date was right. That seems to be a reasonable decision and in any case it is one with which I cannot interfere in revision. The petition is therefore dismissed with costs.

K. S. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE ABDUR RAHMAN.

Kachi Muhaidin Tharaganar ... *Appellant (Defendant)**

v.

Sainambu Ammal and others ... *Respondents (Plaintiffs).*

Kachi Muhaidin Tharaganar v. Sainambu Ammal.

Muhammadan Law—Shafei sect—Daughters—Guardianship and custody—Right to maintenance from father after attaining puberty till marriage.

Among the Shafeis the mother is competent to retain her daughters' custody in spite of their having attained puberty up to the time that they are actually married. If the father has any right to the custody of his children he may no doubt enforce that right, but the fact that he has not done so or that his daughters are residing elsewhere does not deprive them of their right to recover maintenance from him till their marriage which is absolute. The right cannot legitimately be linked with the right of the father, if any, to the custody of the children and the father being the legal guardian is also beside the point.

Appeal against the decree of the Court of the Subordinate Judge of Tinnevelly in A. S. No. 180 of 1937 preferred against the decree of the Court of the District Munsif of Ambasamudram in O. S. No. 61 of 1936.

T. P. Gopalakrishna Iyer for Appellant.

N. R. Sesha Iyer for Respondents.

The Court delivered the following

JUDGMENT.—This appeal arises out of a suit brought by one Sainambu Ammal (plaintiff No. 1) in the Court of the District Munsif of Ambasamudram for the recovery of Rs. 402-8-0 in regard to expenses alleged to have been incurred by her on behalf of her minor daughters (plaintiffs 2 and 3) from the 7th November, 1933 to the 2nd February, 1936 and

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* S. A. 94 of 1938. 24th January, 1941.

Kachi Muhaidin Tharaganar v. Sainambu Ammal.

for their future maintenance at Rs. 15 per mensem. The suit was instituted against the minors' father who is said to have divorced the first plaintiff some years ago. The parties were described in the plaint as Muhammadans belonging to the Shafei sect. The expenses before the 7th November, 1933 were recovered by another suit (O. S. No. 355 of 1933) brought by and on behalf of the same plaintiffs in the same court. It was pleaded *inter alia* by the father in the present litigation that the first plaintiff could not recover any maintenance on behalf of the second and third plaintiffs as they had attained puberty and were being unlawfully detained by her in spite of the defendant's demand for their custody. These allegations were denied on behalf of the plaintiffs although, in the absence of the statements of the counsel for the parties before the issues were framed, legal positions for which they contended were not brought out clearly at that stage.

After considering the evidence adduced on behalf of the parties the District Munsif found that the second plaintiff was 15 years of age towards the end of 1934 and that the third plaintiff attained the age in or about February, 1936 when the suit was instituted. In view of that finding and in the absence of any direct evidence as to puberty, he presumed the second plaintiff, in accordance with the rule of Muhammadan Law, to have attained puberty towards the end of 1934 and the third plaintiff at or about the time when the suit was instituted in February, 1936. He further held that inasmuch as the defendant was entitled to the custody of his daughters after they had attained puberty and they could not legitimately reside with their mother after that period, he was only liable for their maintenance up to such time that they had not attained puberty. A decree for Rs. 74-4-8 was, therefore, passed in favour of the plaintiffs and the rest of the claim including the claim for future maintenance was dismissed. It might be stated here that the second plaintiff was found to have been a major at the time when the suit was brought and the first plaintiff's name as a next friend was deleted by the court *suo motu* as a surplusage. This was obviously the right course to adopt and no exception was taken to this procedure by the defendant, subsequently. An appeal against this decree was taken on behalf of the plaintiffs to the Principal Subordinate Judge of Tinnevelly who pointed to the fact that the parties

to the suit were Muhammadans of the Shafei sect and it was, therefore, incorrect for the District Munsif to hold that the mother was entitled to the custody of the daughters up to the time of puberty. He held that according to the Shafei Law, to which the parties admittedly belonged, the mother was entitled to retain custody of her daughters up to the time of their marriage. Finding therefore that the daughters were justified in residing with their mother even after they had attained puberty, he enhanced the amount of the decree to Rs. 134-3-3 for past maintenance and decreed a sum of Rs. 5 per mensem for both the second and third plaintiffs by way of future maintenance until they were married. The defendant appeals and the only important point that has been argued before me is whether the claim for the daughters' maintenance both past and future, was in the circumstances, rightly allowed by the lower appellate court for the period after they had attained their puberty.

It is urged that inasmuch as the father is the legal guardian of his children and his right to give his daughters in marriage cannot be questioned according to the Shafei law, (which in fact clothes him with larger powers in this respect than the law prevailing amongst the Hanafis) the mother's custody should be held to be illegal and the defendant should not, for that reason be held liable for any maintenance. There is, as pointed out by Saiyyid Ameer Ali in his well-known work on Muhammadan Law, a distinction in regard to the law as to the custody of a daughter between the Hanafis on the one hand and the Malikis, Shafeis and Hanbalis on the other. According to Hanafis, the mother is entitled to the custody of her daughter until she attains puberty while according to the latter she is entitled to her custody until she is married. He says at page 294 (Volume II, 4th edition), that:

'According to the judgment of the Courts of Algiers, it appears that in several notable instances, the Hanafi Kazis have followed the Maliki doctrines and decided that the mother is entitled to the custody of her daughters until they were married."

He has referred to the opinion of several jurists given in Fatwa Alamgiri which point to the conclusion that the right of *Hisanat* (custody) terminates when the girl is marriageable although as pointed above, the Malikis and Shafeis hold that it should continue until she was actually married. Since according to the Muhammadan practice and tradition, a girl was expected

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to be married as soon after she attained puberty as possible, the difference between the doctrine of the two sects was pointed out by the learned author to be not so great or marked as would at first sight appear. But with the growth of western civilization in India and having regard to the variation in the angle of vision from which the matter is now generally looked at, particularly amongst those who have imbibed western thought and ideals, supported as it is to some extent by new legislation, when the marriageable age and puberty do not usually coincide, the distinction between the Hanafi and the Shafei doctrines has to be regarded as real. Luckily, however, even the Hanafi jurists in other Muhammadan countries, as referred to by Mr. Ameer Ali, are inclined to accept and act according to the Maliki and the Shafei doctrine on this point and to permit a mother to retain the custody of her daughter up to the time that she is married. Since a girl needs the guidance of her mother more and not less between the time after the attainment of puberty and her marriage, the preference given by the Hanafi jurists to the Shafei view can be well understood and appreciated. If, therefore, the right of custody by the mother were any test in this case, I would have no hesitation in holding, particularly when the parties belonged to the Shafei sect, that the mother was competent to retain her daughters' custody in spite of their having attained puberty up to the time that they were actually married. But the contention put forward on behalf of the defendant has in my opinion no bearing on the question that I have been called upon to decide in this appeal. This was a suit for recovery of maintenance and the rules of maintenance, so far as the children are concerned, have got really nothing to do with the father's right of custody. If the father has any right of custody of his children, he is entitled to enforce that right but the fact that he has not done so or that his children are residing elsewhere does not, in my opinion, deprive them of their right to claim or recover maintenance from their father. The Prophet of Islam declared the maintenance of children to be obligatory on the father and as long as he is in a position to do so and the children have no independent means of their own, it remains his duty to provide for them. That is why even according to the Hanafi jurists, although the father was entitled to the custody of his daughters after puberty, he was held to be liable for the maintenance of

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his daughters up to the time that they were married. This would also show that the right of the daughters to recover their maintenance cannot be legitimately linked with the right of the father to have them in his custody. There is no divergence of opinion between the Hanafis and the Shafeis on this point and Baillie in his Muhammadan Law, while describing the ordinary Hanafi rule in regard to maintenance refers at page 462 (second edition) to the father's absolute duty to maintain his daughters up to the time that they were married (See also Mulla's Muhammadan Law at page 264 para 269, 11th edition).

The contention that the father has been held by their Lordships of the Privy Council in *Imambandi* v. *Mutsaddi*[1], to be the legal guardian of his children is also beside the point. It cannot be denied that he is so but if a minor has certain rights against his legal guardian, there appears to be no justification for holding that the former cannot enforce them against the latter.

It was admitted at the bar that the defendant had married again and has no less than seven children by his second wife. In the absence of any genuine attempt on his part to recover the custody of his daughters, a formal demand by him calling upon them to come and live with him gives some room to doubt his *bona fides*. It appears to be more for the purpose of terminating his liability to pay for their maintenance rather than to enforce his desire to keep them with him on account of the natural tie that binds them together. Nor is the refusal on the part of his daughters to leave their natural mother and to start living with their step-mother and step-brothers and sisters, in the circumstances, unnatural. Considerations of these questions in a suit for maintenance of the daughters before their marriage are however irrelevant. The father's liability to maintain his children is absolute subject of course to his being in a position to bear that burden and to the children not having any independent means of their own. And in this case it is not denied that he has means to do so and the small income which these plaintiffs are making by working for themselves has been duly taken into account. The maintenance awarded is, in spite of its enhancement by the first Court of Appeal, extremely meagre and it is impossible to give effect to the contention that

1. (1918) 35 M.L.J. 422: I.L.R. 45 Cal. 878: L.R. 45 I.A. 73 (P.C.).

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this increase was not justified. Had it been possible for me to do so now, I should have enhanced it still further. But unfortunately, it is not. There is no cross appeal on behalf of the plaintiffs.

For these reasons, the appeal fails and is dismissed with costs.

K. S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PANDRANG ROW AND MR. JUSTICE KING.

Kannoth Punnoron Krishnan (deceased) and others. *Appellants* (1st Defendant and some of his L.Rs.)*

v.

Kanoth Punnaran Thala and others. *Respondents (Plaintiffs and L. Rs. of 2nd Defendant and some of the L. Rs. of 1st (Defendant).*

Krishnan v. Thala.

Madras Marumakkattayam Act (XXII of 1933), S. 48—Retrospective effect—Whether can be given—Right to partition—Death of woman before Act—Absence of legalised marriage.

There is nothing in the language of S. 48 of the Madras Marumakkattayam Act which by necessary implication shows that the section must be applied retrospectively. And the right to partition provided therein cannot be claimed by a person in whose case the other party to the union died before the Act came into force and there could be no legalised marriage.

Appeal against the decree of the District Court of North Malabar in A. S. No. 182 of 1936 preferred against the decree of the Court of the Principal District Munsif of Tellicherry in O. S. No. 545 of 1934.

O. T. G. Nambiar for Appellants.

K. Kuttikrishna Menon and *K. Govindan* for Respondents.

The judgment of the Court was delivered by

King, J.

King J.—In this appeal the question arises whether the provisions of S. 48 of the Madras Marumakkattayam Act of 1932 shall be applied to the partition of a certain item of property. The property was admittedly purchased in the year 1881 by the husband of one Manikkam in the name of Manikkam and their eldest daughter Choyichi. The first part of S. 48 reads:

"Where a person bequeaths or makes a gift of any property to, or

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*S. A. No. 379 of 1937. 28th October 1940.

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purchases any property in the name of, his wife alone or his wife and one or more of his children by such wife together, such property shall, unless a contrary intention appears from the will or deed of gift or purchase or from the conduct of the parties, be taken as *tavazhi* property by the wife, her sons and daughters by such person and the lineal descendants of such daughters in the female line."

The section concludes with a proviso:

"Provided that, in the event of partition of the property taking place under Chapter VI, the property shall be divided on the stirpital principle, the wife being entitled to a share equal to that of a son or daughter".

Both the Courts below have held that this property must be divided *per capita* or in other words, that S. 48 does not apply to its division. Two reasons are given, one by the District Munsif with which the District Judge does not agree and another by the District Judge. The first reason is that S. 48 cannot apply to the property in question because Manikkam cannot legally be called the wife of Kelan, the purchaser. The requirements of a marriage are set forth in S. 4 of the Act, and it is provided by S. 4 (1) (b) (i) that, if the conjugal union has been openly solemnised in accordance with the customary ceremonies that were prevailing in the community to which the parties or either of them belongs before the date on which this Act comes into force and is subsisting on such date, it becomes a regular marriage. It is admitted that Manikkam died before the Act came into force. It is therefore clear that her union with Kelan was not subsisting on that date and therefore her union with Kelan can never have been a legalised marriage. That being so, she was not Kelan's wife and the language of S. 48 cannot apply to the acquisition of this property. This was the view taken by the learned District Munsif and we think it is a sound view and no argument has been addressed to us in appeal which will induce us to alter that opinion.

The second ground upon which the District Judge relies is that S. 48 cannot be made retrospective. This ground also, we think, is sound. It is argued for the appellant that, since the Marumakkattayam Act has created for the first time the right to partition which did not exist before, it is not unreasonable that such a right should be restricted by the proviso which is found in S. 48. We are unable to see any such reasonableness. There was a right of partition before the Act though it depended upon the consent of all the members of the family. If such a consent were given, the division of property acquired in this way would always be *per capita*. There have therefore arisen

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vested interests in the members of a *tavashi* who can rightly expect that property should be divided in a certain way in case they should enter into a partition. The right of partition has merely been extended by the Act and we can see no reason at all why that right should be in any way restricted by making a change of this kind retrospective. There is nothing in the language of S. 48 which directly refers to the period before the Act was passed. There is nothing in the language of the section which by necessary implication shows that the section must be applied retrospectively. It is in accordance with principles of natural justice that, when a new enactment effects a change in the law, that change shall date only from the time the Act comes into force. We can see no reason whatever to regard S. 48 as being on any score retrospective and accordingly hold that this Second Appeal must fail. It is dismissed with costs.

B. V. V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATARAMANA RAO.

Janaki Ammal .. *Appellant* (4th Defendant)*

v.

Sanjeevi Chettiar and others .. *Respondents (Plaintiff and Defendants 1 to 3).*

Janaki Ammal v. Sanjeevi Chettiar

Hindu Law—Temple management vested in joint family members—Hereditary right—Renunciation by one of the holders but not to the next heir—Validity of.

An alienation or release or renunciation of an office of a trustee not for value in favour of the next or immediate heir is valid; otherwise it is invalid.

Narayana v. *Ranga*, (1891) 2 M.L.J. 19: I.L.R. 15 Mad. 183; *Rajam Bhattar* v. *Singarammal*, (1918) 51 I.C. 979 and *Muthukumaraswami Pillai* v. *Subbaraya Pillai*, A.I.R. 1931 Mad. 505, relied on.

Where under a partition deed in a family the right to the management of a temple was mentioned to be a hereditary right to be held by rotation among the existing members for definite periods, but one of the holders of the office renounced the right in favour of his brother assuming he was the next heir while there was his widow who was the next heir,

Held, that the release should be deemed invalid.

Case-law discussed.

Appeal against the decree of the Court of the Subordinate Judge of Trichinopoly in A. S. No. 70 of 1936 (A. S.

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*S. A. No. 987 of 1937. 30th September, 1940.

Janaki Ammal v. Sanjeevi Chettiar.

No. 268 of 1935, District Court) preferred against the decree of the Court of the District Munsif of Trichinopoly in O. S. No. 761 of 1933.

K. V. Srinivasa Aiyar for Appellant.

A. V. Narayanaswami Aiyar for Respondents.

The Court delivered the following

JUDGMENT.—The question for decision in this second appeal is whether a deed of release Ex. B in and by which the husband of the fourth defendant one Pattabhirama Chetti relinquished his right to the management of the temple of Sri Anjaneyaswami described in Schedule A to the plaint in favour of his brother Sanjeevi Chetti is valid. The learned District Munsif was of the opinion that it was invalid; the learned Subordinate Judge took a different view. It is against this decision that the present appeal has been preferred by the fourth defendant.

It is necessary to set out a few facts. The said Anjaneyaswami temple was founded by the plaintiff's father Singaperumal Chetti, the first defendant's grandfather Thiruvengadam Chetti and the father of defendants 2 and 3 Muthukrishna Chetti. They were members of an undivided Hindu family. They also made certain endowments for the due administration of the said temple. On 15th June, 1887, they became divided and entered into an arrangement by which all the family property they were possessed of including the right to the management of the temple and its properties was divided among themselves in accordance with the decision of the panchayatdars who were appointed by them to effect the said division. The arrangement is embodied in Ex. A. So far as the management of the temple and its properties is concerned, the arrangement is set out thus:

"That Thiruvengadam Chetti, the eldest member shall be in management of the aforesaid temple and the properties for a period of two years from the 1st Ani of Sarvajit year corresponding to 13th June, 1887, that from the 1st Ani of the third year next the said Singaperumal Chetti shall be in management for a period of one year and that from the 1st Ani of the next year Muthukrishna Chetti shall be in management till the end of a period of one year and thus they shall be managers by rotation and conduct the charities of the said temple, that when the management changes hands from one sharer to the other sharer, the outgoing manager shall hand over possession of the moveable properties of the said temple such as jewels, vessels etc., and also the fund and lands to the incoming manager and that he shall hand over possession of these things along with an account relating to the profits and expenses of the previous

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years. In this manner the aforesaid three parties and those persons succeeding them respectively by hereditary right shall be managers by rotation."

The arrangement was acted on and the property was managed in rotation by the parties and their sons. Muthukrishna Chetti died leaving him surviving his two sons Pattabhirama Chetti husband of the fourth defendant and Sanjeevi Chetti the plaintiff herein. Pattabhirama Chetti and Sanjeevi Chetti became divided on the 31st January, 1915, and in regard to their turns of management they came to an arrangement by which each of the brothers should manage the property for a period of six months. Thus even this right of management was divided between the brothers. Pattabhirama Chetti and Sanjeevi Chetti managed the temple by turns in accordance with the arrangement and on 7th July, 1926, Pattabhirama Chetti executed a deed of release the validity of which is now in question in favour of Sanjeevi Chetti, the plaintiff, and the operative portion of the said release runs thus:

"We both effected division on 31st January, 1915 and as regards the rotation management which we both made for one year out of four years in the said temple, each of us looks after the same for six months according to the turn of each; and as I have no male issue, as I am suffering from diabetes, heart trouble and other troublesome diseases and have become bodily weak and am quite infirm, as I am afraid of death at any moment and as you yourself are my future heir and brother, I have hereby released to you my six months' rotation—hereditary management—right in the said temple; and hence along with your six months' rotation—management—right you and your heirs shall hereditarily and absolutely manage the entire one year's rotation—management—right of our family inclusive of my six months' right . . . . Hereafter I and my heirs have no right or claim whatsoever in respect of the right of management to the temple or its properties."

Apparently this too was given effect to for some time but later its validity was questioned by the widow and the 1st defendant refused to recognise the plaintiff's sole right to manage the property during the turn of management of Muthukrishna Chetti's branch of the family. Hence the plaintiff has filed the suit for a declaration that he is entitled solely to manage the temple for a period of one year in every four years according to Ex. A by virtue of the said deed of release executed by his brother and for a permanent injunction restraining the defendants from interfering with the plaintiff's management of the trust during his turn of office. If the deed of release is valid he is bound to succeed in the suit or else he fails. The question therefore is whether it is valid.

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It will be seen from Ex. A that it provides a distinct rule of succession namely that the parties to the deed and their successors shall be managers by rotation. *Prima facie* therefore the deed of release contravenes the rule of succession and therefore is invalid. But it is contended that a renunciation of the right of management in favour of a person who is in the line of heirs is valid and that Sanjeevi Chetti being in the line of heirs, the release is valid though it may operate to defeat the right of the next heir, namely, the widow and this is the view taken by the lower Court. In support of this view reliance was mainly placed on a decision of the Bombay High Court in *Mancharam* v. *Pranshankar*,[1] a decision of Varadachariar, J., in *Sri Mahant* v. *Govindacharlu*,[2] and a decision of mine reported in *Alasinga Bhattar* v. *Venkatasudarsana Bhattar*[3]. So far as my decision is concerned, I may at once state that I had not to consider this question in that case. The question there was whether a certain partition arrangement among the members of a family with reference to the trusteeship of a temple was valid. I referred to *Mancharam* v. *Pranshankar*[1] and *Sri Mahant* v. *Govindacharlu*,[2] to illustrate that usage was resorted to for supporting an alienation under certain conditions.

There can be no doubt that an alienation of the office of trustee of a temple, whether public or private, is invalid, though as pointed out in *Rajaram* v. *Ganesh*,[4] by force of custom alienation was permitted under certain conditions. *Sri Mahant* v. *Govindacharlu*,[2] is an instance in point and I shall discuss this decision later. In *Mancharam* v. *Pranshankar*,[1] an alienation by will in favour of a person who was not the immediate heir was upheld. I shall also discuss how far the view expressed in it is correct. It is settled by a uniform course of decisions that an alienation for value in favour of a stranger is invalid. But the question has arisen whether an alienation by a person in favour of a heir either next or remote is not valid. The question again would be whether such an alienation is for value or for no consideration: the better and sounder view is that if for value it is invalid. In *Mancharam* v. *Pranshankar*,[1] what happened was this. Two brothers were jointly entitled to an office and each was enjoying severally by rotation. One of the

1. (1882) I.L.R. 6 Bom. 298.
2. (1934) 68 M.L.J. 295: 1935 M.W.N. 59.
3. (1935) 70 M.L.J. 424: 1936 M.W.N. 585.
4. (1898) I.L.R. 23 Bom. 131.

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brothers made a will bequeathing his right to the office in favour of his sister's son. The bequest was held to be valid. Melvill, J., relied on the decision in *Sitarambhat et al* v. *Sitaram Ganesh* and *Kashiraj Nanabhat*[1] particularly on the following observation referring to the facts of that case:

"In this case the purchasers were grandchildren, who would eventually succeed to the office as heirs, and the grandfather did nothing more than relinquish his right in their favour. There have been previous dealings with this office of a somewhat similar nature, which is some evidence of a usage justifying the alienation in the present case."

After referring to this observation Melvill, J., observed:

"We do not think that there is much difference, in principle, between the case just cited and that now before us, though the endowment in the present case is of too recent a foundation to render any evidence of usage possible. In both cases the purchasers are persons standing in the line of succession, and claiming through females; and though in the present case the purchaser is not the next heir but only a possible heir—for he is Ganpatram's sister's son, and therefore a bandhu, if not a sapinda..Yet the next heir, Ganpatram's widow, has expressed her acquiescence in the bequest to the plaintiff."

The learned Judge concluded by the following observation:

"(in the absence of any restriction to a particular class of heirs, imposed either by the founder or by usage), there would appear to be no reason why an alienation should not be upheld, which is made in favour of any person standing in the line of succession, and not disqualified by any personal unfitness"

It will be seen from this judgment that reliance was placed by Melvill, J., on *Sitarambhat et al* v. *Sitaram Ganesh and Kashiraj Nanabhat*,[1] which itself is founded on the usage governing a particular office. Again, in the case which the learned Judge was deciding, he relies also on the acquiescence of Ganpatram's widow and whether Ganpatram's sister's son was the next immediate heir after the widow or not it is not clear, in which case the decision can be supported on the ground that Ganpatram's widow would be deemed to have disclaimed and that therefore the alienation in favour of Ganpatram's sister's son would be taken to be an alienation in favour of the next heir. So far as the actual decision on the facts is concerned, it may be possible to support the view of Melvill, J., either on the ground of the custom or on the ground of the alienation being in favour of the next heir. But what is relevant for the purpose of this case is the observation in the concluding portion of

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1. (1869) 6 Bom.H.C.R. (A.C.J.) 250.

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the judgment which I have just given. It seems to me that an alienation in favour of a person who is not the next heir would be contravening the intention of the founder if there is a deed which says that the office should be enjoyed by a trustee and his heirs. An alienation in favour of the next heir, if not for consideration, can be supported and is generally supported on the ground that it operates as a renunciation by the person making it of the office, and that the renunciation would in effect operate as a civil death just as in the case of a Hindu widow by a surrender accelerating the succession and the next heir in whose favour the alienation is made will be succeeding him in the office. In *Giris Chandra Saw* v. *Upendranath Giridas*,[1] Suhrawardhy, J., took this view with which I agree. In the course of the judgment he observed thus:

"A holder of a life estate is entitled to accelerate succession by relinquishing his right in favour of the reversioner. This is the settled law in the case of a Hindu widow qualified by the condition that the relinquishment must be of the entire estate. The same view may legitimately be adopted in the case of a shebait who is the manager for life of an endowment and there is no violation of any principle of law in holding that such a manager is entitled to accelerate the succession of his successors in office by relinquishing or resigning the office."

In Mr. Ganapathi Aiyar's Book on Religious Endowments at page 556, I find the following passage:

"The same considerations which may apply to gifts in favour of the next heir will not apply to gifts in favour of a person who though a member of the family is not the next or immediate heir. In the latter case the gift in effect contravenes the intentions of the founder. If the office is hereditary, the founder whose right it is to make rules has prescribed a course of succession, and it is contravening the course of succession pointed out by the founder if we uphold a gift to a member of the family who may be remotely connected as a *Samanodaka* or a *Bandhu*."

I would adopt this reasoning as sound in principle. Once it is held that a transfer can be in the line of heirs it would depend on the caprice of the last holder and he can disinherit the next heir however fit he may be, thus frustrating the intention of the founder. In *Narayana* v. *Ranga*[2], the question directly arose for decision. In that case there was an alienation by the last holder of an office in favour of the plaintiff's father. The learned Judges called for a finding whether the plaintiff's father was the next heir; if next, whether he was the sole heir. The finding was that the plaintiff's father was not

1. (1931) 35 C.W.N. 768.
2. (1891) 2 M.L.J. 19: I.L.R. 15 Mad. 183.

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the sole next heir because he had three brothers. They held that the alienation was invalid. Muthuswami Aiyar and Shepherd, JJ., made the following observations:

"Unless the alienee is the sole heir the alienor might be under the temptation to make the office the subject of bargain and thereby defeat the intention of the founder. It was in this view that we called for a finding at the former hearing. We are not prepared to dissent from the dictum above quoted, and to hold that in the absence of special usage an alienation would be valid if made in favour of any person other than the sole immediate heir."

Therefore this decision is direct authority for the view that an alienation of the office of a trustee in order to be valid must be in favour of the sole immediate heir. Though the alienation was for value, the decision was rested on this ground. This was also the view taken by Phillips and Kumaraswami Sastri, JJ., in *Rajam Bhattar* v. *Singarammal*[1]. They seem to regard *Mancharam* v. *Pranshankar*[2] as relating to a transfer to one next in the line of succession. In *Muthukumaraswami Pillai* v. *Subbaraya Pillai*[3] Madhavan Nair J. followed *Narayana* v. *Ranga*[4], and referred to that decision as enunciating the proposition that in the absence of special usage the alienation of a religious office would not be valid if made in favour of any person other than the sole immediate heir. Then he dealt with the decision in *Mancharam* v. *Pranshankar*[2], thus:

"The decision in *Mancharam* v. *Pranshankar*[2], relied on by the appellants in support of the general proposition is accepted by this Court only for the view that a transfer to one next in the line of succession may be held to be valid. See *Rajam Bhattar* v. *Singarammal*[1].

The learned Judge decided against the validity of the transfer in the case with which he was dealing on the ground that the plaintiffs in whose favour the alienation was made were not the immediate heirs next in the line of succession. In *Sri Mahant* v. *Govindacharlu*[5], Varadachariar, J., was dealing with an alienation of the office of archaka by the last holder of the office in favour of his sister's son. The learned Judge adverted to several considerations for supporting the alienation. On page 304 he says the case of an alienation of the office of archaka must be viewed differently from a bare transfer of a

1. (1918) 51 I.C. 979; 36 M.L.J. 355.
2. (1882) 6 Bom. 298.
3. A.I.R. 1931 Mad. 505.
4. (1891) 2 M.L.J. 19: I.L.R. 15 Mad. 183.
5. (1934) 63 M.L.J. 295: 1935 M.W.N. 59.

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trustee's office. After referring to *Raja Verma Valia* v. *Ravi Vurma Kunhi Kutti*[1] where their Lordships of the Privy Council refer to the doctrine of *delegatus non potest delegare* and the possibility that the recognition of a right of transfer may defeat the presumed intention of the founder of the endowment, the learned Judge remarks thus:

"These two considerations have greater relevancy to cases where the trustee's office is sought to be alienated than to transfers of archakaship; indeed, in the case of archakas, the right of delegation has been expressly recognised by permitting the system of proxies."

Then referring to the observation of Ranade, J., in *Rajaram* v. *Ganesh*[2], that by "force of custom a limited right of partition and alienation might be established", the learned Judge again remarks:

"This observation would suggest that custom must be invoked to justify alienation".

After indicating these views in support of the alienation in question before him, he concludes thus:

"In this state of the authorities, we think that in the circumstances of this case, our decision may be rested on a narrow ground. The facts here are almost *ad idem* with those in *Mancharam* v. *Pranshankar*,[3] and we have not been referred to any reported case where this decision has been dissented from on similar facts."

Then he referred to the cases in *Kuppa Gurukkal* v. *Doraisami*[4], *Narayana* v. *Ranga*[5], *Alagappa Mudaliar* v. *Sivaramasundara Mudaliar*[6], *Sundarambal Ammal* v. *Yogavanagurukkal*[7] and *Rajam Bhattar* v. *Singarammal*[8] and observed:

"This Court merely refused to apply the principle of *Mancharam* v. *Pranshankar*[3], to transfers for value or to transfers in favour of strangers. This does not seem to require or justify our refusing to follow the decision in *Mancharam* v. *Pranshankar*[3], even when the alienation is to one in the line of heirs, is not for consideration, and is not in any way opposed to or inconsistent with the interests of the institution."

Ultimately the learned Judge held that the custom of the institution was established in favour of the alienation in question. So far as the interpretation placed by the learned Judges on the Madras decisions is concerned, it seems to me, if I may say so with respect, that it is not accurate. In *Narayana* v.

1. (1876) I.L.R. 1 Mad. 235: L.R. 4 I.A. 76 (P.C.).
2. (1898) I.L.R. 23 Bom. 131.
3. (1882) I.L.R. 6 Bom. 298.
4. (1882) I.L.R. 6 Mad. 76,
5. (1891) 2 M.L.J. 19: I.L.R. 15 Mad. 183.
6. (1895) I.L.R. 19 Mad. 211.
7. (1914) I.L.R. 38 Mad. 850.
8. (1918) 36 M.L.J. 355.

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Ranga[1], as I have already pointed out, the view taken was that an alienation could be upheld only in favour of the immediate heir and not to one in the line of heirs. In *Kuppa Gurukkal* v. *Doraisami*[2], the learned Judges expressly left open this question because referring to *Mancharam* v. *Pranshankar*[3], they made the following observation:

"It is not necessary for us to determine in this case whether we should be disposed to go the length of what is decided in *Mancharam* v. *Pranshankar*[3], that a purchase by a person standing in the line of heirs or otherwise qualified should be upheld."

In *Alagappa Mudaliar* v. *Sivaramasundara Mudaliar*[4], the learned Judges were inclined to accept the view taken in *Narayana* v. *Ranga*[1], because in the course of the judgment they referred to *Narayana* v. *Ranga*[1], with approval thus:

"It is clearly intended that the brothers other than the plaintiff shall divest themselves altogether of all right of control over the choultry. For the future it was intended that the right of management should devolve in the line of the plaintiff and his heirs to the exclusion of his brothers In our opinion it makes no difference that the alienee is a member of the same family (vide *Kuppa Gurukkal* v. *Doraisami*[2] and *Narayana* v. *Ranga*[1]. We think the Subordinate Judge was right in holding the alienation to be invalid."

No doubt the alienations in those cases were for value but the decisions were not put on that ground. The decision in *Sri Mahant* v. *Govindacharlu*[5], can be distinguished on the ground that there was a finding that a custom in support of the alienation in question was established and that it was a case of the office of archaka which according to Varadachariar, J., ought to be viewed differently from the office of a bare trustee. In dealing with *Rajeswar Mullick* v. *Gopeshwar Mullick*[6], the learned Judge observes thus:

"Cases where the hereditary office involves considerable beneficial interest cannot be put on the same footing as bare trusts for all purposes."

The present case is a case of a bare trust. It will also be seen that Varadachariar, J., does not refer to the decision in *Rajam Bhattar* v. *Singarammal*[7], or in *Muthukumaraswami*

1. (1891) 2 M.L.J. 19: I L,R 15 Mad. 183.
2. (1882) I.L.R. 6 Bom. 76.
3. (1882) I.L.R. 6 Mad. 298.
4. (1895) I.L.R. 19 Mad. 211.
5. (1934) 68 M.L.J. 295: 1935 M.W.N. 59.
6. (1907) I.L.R. 35 Cal. 226.
7. (1918) 51 I.C. 979: 36 M.L.J. 355.

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Pillai v. *Subbaraya Pillai*[1]. It seems to me that on principle the view enunicated in *Narayana* v. *Ranga*[2] and followed in *Rajam Bhattar* v. *Singarammal*[3] and *Muthukumaraswami Pillai* v. *Subbaraya Pillai*[1], is sound. I would therefore hold that an alienation or release or renunciation of an office of a trustee not for value in favour of the next or immediate heir is valid; otherwise it is invalid. In this case the renunciation was made by Pattabhirama Chetti in favour of his brother on the assumption that he was the next heir. As the renunciation was not in favour of the next heir, the widow, the release must be deemed to be invalid. I therefore reverse the decision of the lower appellate Court. I direct each party to bear his own costs throughout. Leave to appeal is refused.

K. C. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KING.

Sinnaswami Goundan ... *Appellant* (Plaintiff)*

v.

Rama Goundan and others .. *Respondents (Defendants 1, to 3,* 5 *and 6, to 10).*

Sinnaswami Goundan v. Rama Goundan.

Transfer of Property Act (IV of 1882), S. 92—Right of subrogation—Circumstances in which decree amount satisfied in full by two of the mortgagees—Right to be claimed by both.

Where there were three mortgages on a property and a decree on the first of them obtained against the mortgagor was satisfied by means of two different payments, one made by the first defendant and the other by the plaintiff, on the question as to the order in which the money realised by the sale of the mortgaged properties under a decree on the third mortgage would have to be distributed,

Held, that if the situation be analysed as a whole, it would be clear that the first mortgage had been paid off by two persons, plaintiff and defendant, neither of whom would have been able to pay it off without the help of the other. There is no principle that when a mortgage is paid off by more than one person, only the person who makes the final payment in point of time is entitled to the right of subrogation. All that S. 92 of the Transfer of Property Act requires is that when the right is claimed, the mortgage shall have been redeemed in full. Both the first defendant and the plaintiff in the suit would be entitled to subrogation in the payment of the money realised by sale of the mortgaged properties.

Hira Singh v. *Jai Singh*, I.L.R. 1937 All. 880 at 900 (F.B.), followed.

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1. A.I.R. 1931 Mad. 505.
2. (1891) 2 M.L.J. 19: I.L.R. 15 Mad. 183.
3. (1918) 51 I.C. 979: 36 M.L.J. 355.

* S. A. No. 173 of 1938 and C. M. P. No. 1257 of 1941. 31st January, 1941.

Sinnaswami Goundan v Rama Goundan.

Appeal against the decree of the Court of the Subordinate Judge (Additional) of Coimbatore in A. S. No. 311 of 1936 (A.S. No. 373 of 1936, District Court, Coimbatore) preferred against the decree of the Court of the District Munsif of Gobichettipalayam in O. S. No. 496 of 1935 etc.

K. Subramaniam and *R. Rangachariar* for Appellant.

A. C. Sampath Aiyangar for Respondents.

The Court delivered the following

JUDGMENT.—This appeal raises the question of subrogation. There are three mortgages with which the appeal is concerned. The first was executed in 1917 and the mortgagee's rights in that mortgage were finally assigned to the fifth defendant who filed a suit in 1933 and obtained a decree. That decree has been satisfied by means of two payments, one by the first defendant of Rs. 350 made in 1934 and one by the plaintiff of Rs. 398 made in 1935. By the payment of that Rs. 398 by the plaintiff the decree was satisfied in full. The second mortgage was in favour of the seventh defendant and was executed on the 6th June, 1918. The third was in favour of the plaintiff executed in September, 1922. Plaintiff has obtained a decree on this third mortgage and the question is as to the order in which the money which will be realised by the sale of the mortgaged properties is to be distributed. Plaintiff claims that he is to be paid first the sum of Rs. 398 which he utilised to pay off the first mortgage, that the seventh defendant should then be paid the amount due under his mortgage, and thirdly, that the balance should be paid in satisfaction of the plaintiff's own mortgage. Plaintiff's principal opponent is the first defendant. He claims that he is equally entitled to the right of subrogation and that the sums of both Rs. 398 to the plaintiff and Rs. 350 to himself must be paid before either the mortgage to the seventh defendant or the mortgage to the plaintiff is paid off. The seventh defendant, who is also represented before me, does not seriously contest the position that there is a priority coming before his mortgage. The real dispute is therefore between the plaintiff and the first defendant and the question is whether the right of subrogation should be conceded to the plaintiff alone or to both the plaintiff and the first defendant.

S. 92 of the Transfer of Property Act governs the decision of this point and it runs as follows:

"Any of the persons referred to in S. 91 (other than the mortgagor)

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and any co-mortgagor shall, on redeeming property subject to the mortgage, have, so far as regards redemption, foreclosure or sale of such property, the same rights as the mortgagee whose mortgage he redeems may have against the mortgagor or any other mortgagee.

The right conferred by this section is called the right of subrogation, and a person acquiring the same is said to be subrogated to the rights of the mortgagee whose mortgage he redeems.

A person who has advanced to a mortgagor money with which the mortgage has been redeemed shall be subrogated to the rights of the mortgagee whose mortgage has been redeemed, if the mortgagor has by a registered instrument agreed that such persons shall be so subrogated.

Nothing in this section shall be deemed to confer a right of subrogation on any person unless the mortgage in respect of which the right is claimed has been redeemed in full."

It is argued for the plaintiff, who is the appellant here, that there can be no right of subrogation unless a mortgage has been completely redeemed and therefore it is only by the act of some person which results in the complete redemption of the mortgage that any right of subrogation can be created. In the present case as the first defendant paid Rs. 350 on the 20th August, 1934, and the mortgage was still left outstanding in part after that payment he could by that payment acquire no right of subrogation. It was the plaintiff's payment alone which resulted in the redemption of the mortgage. It does not seem to me that such a position is in accordance with the equitable principles upon which the right of subrogation is based. Nor do I find anything within S. 92 itself which prohibits a claim made by the first defendant in the circumstances of this case. The one essential proviso for the coming into existence of the right of subrogation is that a mortgage shall have been redeemed in full. When the present suit was filed the mortgage of 1917 had been redeemed in full. There appears to me therefore nothing in the section itself to prevent any person who is qualified by the first portion of the section from claiming a right of subrogation. It is not denied by any one before me that both the plaintiff and the first defendant are qualified within the first clause of S. 92 and it is obviously a mere accident that the payment by the first defendant happened to be prior in time to the payment by the plaintiff. If the situation be analysed as a whole it will be clear that this mortgage has been paid off by two persons, neither of whom would have been able to pay it off without the help of the other. I cannot see any principle upon which one of these persons should be granted and the other denied the right of subrogation. As I

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see it, all that the section requires is that when the right is claimed the mortgage shall have been redeemed in full. I have not now to consider whether the first defendant had or had not the right of subrogation during the twelve months or so which intervened between his payment and that of the plaintiff. What I have to decide is whether the first defendant could claim the right of subrogation while the present suit was pending. There are no direct authorities dealing with a similar situation to which my attention has been called. But it seems to me that the discussion of the Full Bench of the Allahabad High Court at the conclusion of their judgment in, *Hira Singh* v. *Jai Singh*[1] and the facts of that case, can be utilised in support of the position that both the first defendant and the plaintiff in this appeal are entitled to the right of subrogation. It is pointed out by the learned Judges in that paragraph that the section does not require that the person claiming subrogation should himself have paid the entire amount of the previous mortgage debt. The facts of the Allahabad case are that the mortgagor sold the mortgaged properties to three separate purchasers contracting with each of them that they should pay off a portion of the mortgage debt binding upon the property, and the mortgage debt was eventually paid off on the same day by all the three purchasers with the addition of a small sum paid by the mortgagor himself. Of course in one sense of the word the payments by the three vendees in this case could be called simultaneous. But if the situation be more closely analysed, it follows that one of the three vendors must have paid first, another must have paid second and the third must have paid third even if there were only a few minutes interval between each of the payments. If the argument of the learned counsel for the appellant in this case were accepted it would follow that though the vendee who paid first and the vendee who paid second would get no right of subrogation, the vendee who paid last would have a right of subrogation for the full amount of the payment. Such a situation could never have been contemplated as possible by the Legislature; and as has already been indicated, there is nothing in S. 92 which lays it down that when a mortgage is paid off by more than one person only the person who makes the final payment in point of time is entitled to the right of subrogation. It seems to me therefore that the decree of the lower appellate

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1. I.L.R. (1937) All. 880 at 900.

court in this matter, ordering that both the first defendant and the plaintiff should be entitled to this right in the payment of the money realised by the sale of the mortgaged properties is the correct decree. This appeal fails and must be dismissed with costs.

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There is however an application on behalf of the appellant under the Agriculturists' Relief Act (Act IV of 1938). This application will be remitted to the court of first instance for disposal and the decree of this court will be subject to its decision.

Leave to appeal is refused.

K. C. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATARAMANA RAO.

Sri Rajah Vyricherla Narayana Gajapati Raju Bahadur .. *Appellant* (Plaintiff)*

v.

Konathala Jaggayya and others.. *Respondents (Defendants).*

Narayana Gajapati Raju Bahadur v. Jaggayya.

Madras Estates Land Act (I of 1908), S. 151—Principles governing application of the section—Nature of structures that can be put up by the tenant.

The Courts have nothing to do with the policy of rural reconstruction in construing a statutory provision like S. 151 of the Madras Estates Land Act. The object of S. 151 is that the value of the land as agricultural land should be strictly maintained and any attempt made by the tenant to divert the land for non-agricultural purposes should be prohibited. He can only make such improvements as are necessary for the beneficial enjoyment of the holding. He cannot be allowed to take the law into his own hands and plead nor should the Court take the view that it is enough that the landlord is given compensation.

Erection of compound wall to the holding to prevent cattle, etc., from trespassing into it is valid and an improvement within the meaning of S. 3 (4) (*d*) of the Act.

The tenant may be given permission to put up a structure on a reasonable portion of the holding for the purpose of storing crops which are raised on the holding but not for the purpose of storing grain purchased from others or for using the same for any business which is carried on by him.

Appeal against the decree of the District Court of Vizagapatam in A. S. No. 187 of 1936 preferred against the decree of the Court of the Deputy Collector of Vizagapatam in S. S. No. 515 of 1935.

K. Umamaheswaran for Appellant.

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* S. A. No. 1091 of 1937. 4th October, 1940.

Narayana Gajapati Raju Bahadur *v.* Jaggayya.

M. Appa Rao for Respondents.

The Court delivered the following

JUDGMENT.—This second appeal arises out of a suit in ejectment filed by the plaintiff who is the proprietor of the Anakapalli Estate against the defendants who are his tenants in possession of the suit land covered by Patta No. 223 of Anakapalli village on the ground that they have diverted a portion of the holding for non-agricultural purposes by digging up the land and laying foundations for constructing a superstructure thereon and also by enclosing another portion of the holding with a compound wall the result of which according to the plaintiff was that 14 cents of land would become unfit for use for agricultural purposes. The defendants pleaded that their intention was to erect a farm house for storing the grain harvested on the holding and for other agricultural purposes. The learned Deputy Collector was of the opinion that the intention of the defendants was not to store the grain raised on the land but to store articles in respect whereof they were carrying on a business. He was however of the opinion that the compound wall was raised on a portion of the land which was formerly covered by a koradi and which was never under cultivation before and that the said wall was in a line and served as a protection from the trespass of the cattle passing along the adjoining road. He came to the conclusion that the defendants laid the foundation and built the compound wall without the permission of the landlord and they were not *bona fide* in doing so. He however thought in the circumstances of the case that compensation would be an adequate relief to the plaintiff and awarded Rs. 109-6-0 as damages. On appeal the learned District Judge thought that as the defendants had laid foundations at a cost of Rs. 700 and there was only 'a breach of a technical provision of law' the plaintiff could be compensated in money for his damages. This is how he remarks in the judgment:

> "It is unreasonable not to make a liberal use of the provisions of S. 152 of the Estates Land Act and of the general rules of equity when no injury is caused to the landlord. In these days of rural reconstruction, especially every facility possible under the law should be given to ryots to improve the storing of their agricultural produce or even the agricultural produce bought from others and for preventing them from the senseless waste involved by destroying foundations worth Rs. 700 by spending another Rs. 50."

Taking this view of the law he gave leave to the defendants to erect pucca granaries on the suit land for the sole

purpose of storing agricultural produce like grains, gingelly and other oil seeds, onions, cotton, jaggery, etc., whether grown on the suit land or other holdings of theirs or even bought by them from other ryots. He further directed the defendants to keep the compound wall intact and also the 14 cents enclosed within the compound wall without any cultivation. I think the learned District Judge's view of Ss. 151 and 152 of the Estates Land Act is not correct. The Courts have nothing to do with the policy of rural reconstruction in construing a statutory provision. The object of S. 151 is that the value of land as agricultural land should be strictly maintained and that any attempt made by the tenant to divert the land for non-agricultural purposes should be prohibited. He is only allowed to make such improvements as are necessary for the beneficial enjoyment of the holding. The tenant cannot be allowed to take the law into his own hands and plead nor should the Court take the view that it is enough that the landlord is given compensation. I do not know what the learned Judge means when he says that the landlord is not hurt. In my opinion the landlord is really hurt within the meaning of the statute when the land is diverted for non-agricultural purposes. Of course the Court is given a certain amount of discretion under S. 151 even in cases where the tenant is found liable to ejectment to award compensation and the relief to be given will have to be moulded according to the circumstances of each case. The question in this case is whether the discretion exercised by the lower Court in awarding compensation is proper and should be interfered with. So far as the erection of the compound wall is concerned it seems to me that it cannot be said that the use of the land for that purpose was a diversion for non-agricultural purposes. P. W. 1 in his evidence states that the compound wall occupies the place where previously there were trees and fence and that the fence was necessary to prevent cattle from trespassing into the field and destroying the crop raised. He also says that there is a vacant space of 10 cents between the foundation and the compound wall which can be cultivated. Thus the compound wall will be an improvement within the meaning of S. 3 (4) (*d*) of the Act because it is necessary for the convenient enjoyment of the holding by preventing the trespass of cattle into the field. So far therefore as the compound wall is concerned, the erection of the same cannot be made a ground of complaint by the plaintiff landlord for maintaining an action under S. 151.

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The next question is whether the laying of foundations on $4\frac{1}{4}$ cents of land by the defendants would entitle the plaintiff to have them evicted or whether compensation would not be an adequate relief. The entire extent of land is 64 cents. Having regard to the extent of land on which the foundations were laid, if restrictions were placed on the defendants in regard to the kind of superstructure that they should build thereon and the use that should be made of it, I think that compensation would be an adequate relief. It seems to me that the defendants can be given leave to erect a structure on this piece of land for the purpose of storing crops which are raised on the holding and not for the purpose of storing grain purchased from others or for using the same for any business which is being carried on by them. The defendants can therefore if they like, build a superstructure on the 4 1/4 cents and use it for the purposes of storing the crops raised on the holding but if they use it for any other purposes they will be liable to be evicted and it is open to the landlord (plaintiff-appellant) to institute proceedings under S. 151 of the Act. Of course if the defendants at any time want to build a farm house, there could be no objection at all because they are entitled to do so. The order of the learned District Judge giving the defendants leave to erect a pucca building on the holding for the purposes mentioned by him in his judgment ought to be vacated. The order requiring the defendants to keep the area enclosed within the compound wall without any cultivation must also be vacated. As I have found that the compound wall is necessary for the beneficial enjoyment of the holding and as I have vacated the order of the learned District Judge giving the defendants leave to construct a pucca building for the purposes mentioned by him I think the compensation awarded by the lower appellate Court should be reduced, and it is accordingly reduced to Rs. 125. Irrespective of the use the defendants are going to make of the land on which foundations are laid, they must continue to pay rent for the entire holding. In the circumstances I direct each party to bear his own costs in the second appeal.

Leave to appeal is refused.

S. V. V. *Decree modified.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PANDRANG ROW AND MR. JUSTICE SOMAYYA.

Sri Rajah Vyricherla Narayana Gajapati Raju Bahadur Varu .. *Appellant** (*2nd Claimant*)

v.

Perla Annapurnamma Garu and others .. *Respondents* (*1st Claimant*).

Narayana Gajapati Raju Bahadur Garu v. Annapurnamma Garu.

Land Acquisition Act (I of 1894). Ss. 18 and 31—Reference to District Court—Compensation, apportionment of—If Court can increase compensation in favour of a party who has not applied for reference—Sudden rise in prices due to a windfall—Melvaramdar, if entitled to benefit of such rise in value.

On a reference to the District Judge under S. 18 or 31 of the Land Acquisition Act it is not open to the Court to decide the amount of compensation payable to a party who never asked for a reference and give a decree to him for anything more than what was awarded by the Land Acquisition Officer, in the absence of any reference made to the Court by the Land Acquisition Officer at the instance of such person. On a reference under S. 18 the jurisdiction of the Court is confined to considering and pronouncing upon the objection which had been raised in the written application for reference.

Where a land has risen in value owing to the location of the University and harbour nearby, a part of the benefit of this enormous rise in value may also be granted to the melvaramdar and a grant of one-third of the compensation paid for the entire land as the share of the melvaramdar is not improper.

Appeals respectively against the decrees of the District Court, Vizagapatam dated the 11th September, 1937 and passed respectively in O. Ps. Nos. 78, 80 and 77 of 1937.

The Advocate-General (*Sir A. Krishnaswami Aiyar*) and *K. Umamaheswaran* for Appellant.

P. Somasundaram and *M. Appa Rao* for Respondents.

The judgment of the Court was delivered by

Pandrang Row, J.

Pandrang Row, J.—These three connected appeals arise out of certain acquisitions of land made for the Andhra University buildings at Waltair in the Vizagapatam District. Appeals 123 and 133 may be dealt with together as they raise the same question. That question is whether the lower Court had jurisdiction to decide the amount of compensation due to the melvaramdar and give a decree for anything more than what was awarded by the Land Acquisition Officer, in the absence of any reference made to the lower Court by the Land

* Appeals Nos. 123, 126 and 133 of 1938. 17th January, 1941.

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Acquisition Officer at the instance of the melvaramdar. The Land Acquisition Officer awarded in one case about Rs. 64 and in the other case about Rs. 48 to the melvaramdar Perla Annapurnamma Garu, while the appellant before us, who is the Zamindar of Chemudu was awarded in one case Rs. 11,000 and odd and in the other case Rs. 8,800 and odd as the permanent ryot of the land. A sub-lessee appears to have been given nothing as compensation. There was a reference made to the District Judge under S. 18 of the Land Acquisition Act at the instance of the Zamindar of Chemudu, but there was no reference asked for and no reference made at the instance of the respondent Perla Annapurnamma Garu. Nevertheless the Court below has awarded a much larger amount out of the total amount awarded, namely, 1/6th of the total amount to Perla Annapurnamma as compensation for her rights as melvaramdar. The point appears to us to admit of no doubt. It was decided so long ago as 1907 in *Abu Bakar* v. *Peary Mohan Mukherjee*[1], that (1) a party who raises no objection to the apportionment of the compensation made by the Collector must be taken to have accepted the award in that respect and (2) that under Ss. 18, 20 and 21 of the Act all that the Court can deal with is the objection which has been referred to it, and it cannot go into a question raised for the first time by a party who had not referred any question or any objection to it under S. 18 of the Act. This decision was followed in a number of other cases and it is enough to refer to *Gobinda Kumar Roy Chowdhury* v. *Debendra Kumar Roy Chowdhury*[2] and *Gangadara Sastri* v. *The Deputy Collector of Madras*[3]. It is perhaps desirable that we should refer to a clear pronouncement by their Lordships of the Judicial Committee in *Pramatha Nath Mallick* v. *Secretary of State for India in Council*[4]. It was held in that case that on a reference made to the Court under S. 18 of the Act the jurisdiction of the Court is confined to considering and pronouncing upon the objection which had been raised in the written application for the reference. At page 1152 their Lordships make the following observations:

"Their Lordships have no doubt that the jurisdiction of the Courts under this Act is a special one and is strictly limited by the terms of these sections. It only arises when a specific objection has been taken to the

1. (1907) I.L.R. 34 Cal. 451. 2. (1907) 12 C.W.N. 98, 985 and 987.
3. (1912) 22 M.L.J. 379 at 383.
4. (1929) 58 M.L.J. 223: L.R. 57 I.A. 100: I.L.R. 57 Cal. 1148 at 1152.

Collector's award, and it is confined to a consideration of that objection. Once therefore it is ascertained that the only objection taken is to the amount of compensation, that alone is the 'matter' referred, and the Court has no power to determine or consider anything beyond it."

Their Lordships make particular reference to the words found in S. 21 of the Act which restrict the scope of the inquiry before the Court to a consideration of the interests of the persons affected by the objection. It is therefore clear to our minds that what the lower Court did was something which it had no jurisdiction to do. It purported to decide the question whether the respondent Perla Annapurnamma was entitled to a larger amount as compensation as the melvaramdar than what was awarded by the Land Acquisition Officer, in spite of the fact that she had made no objection to the award and had not asked the Land Acquisition Officer to make any reference claiming a larger amount, than what was awarded to her, and in spite of the fact that no reference really was made at her instance. There was no doubt a reference made, but that was one not made at her instance but by the Land Acquisition Officer on his own accord under S. 31 of the Act because she was not competent to alienate the land being a limited owner. That reference, however, gave the Court no jurisdiction to decide what compensation should be paid to her as the melvaramdar or to decree any amount over and above what was awarded to her by the Land Acquisition Officer. On this sole ground these appeals have to be allowed apart from any question of hardship for, this is a matter which affects the jurisdiction of the Court, and where there is no jurisdiction there can be no plea of either hardship or waiver and so on. As a matter of fact we have no reason to suppose that there was any waiver in this case. No doubt want of jurisdiction was not expressly pleaded in the written claim presented by the appellant in the lower Court, and that was because his claim was put forward long before the respondent appeared on the scene and filed her claim. There are no circumstances from which a waiver can be inferred, and on the other hand it is clearly seen from the judgment of the Court below that an objection to jurisdiction was actually taken and was decided by the lower Court. The lower Court relied on a case the judgment in which makes no reference at all to the particular point of jurisdiction. These appeals must therefore succeed and they are allowed and the decree of the Court below so far as it awards any amount over and above what was

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awarded to the respondent as the melvaramdar by the Land Acquisition Officer is set aside. In other words, the award of the Land Acquisition Officer in these two cases is confirmed. The appellant will be entitled to have his costs in this Court in these two appeals from the respondent.

Appeal 126 raises a different question. It relates to a similar acquisition in which a larger amount was awarded to the same melvaramdar than what was awarded by the Land Acquisition Officer. But in this case there was a reference by the Land Acquisition Officer under S. 30 of the Act because there was a dispute about the apportionment. It cannot therefore be said that the Court had no jurisdiction to decide the question of apportionment. It is urged, however, on behalf of the appellant that the reference itself was incompetent but there is really no substance in this contention because the award itself shows that there was a dispute regarding the apportionment and it cannot be said that the Land Acquisition Officer acted illegally or without jurisdiction in making the reference which he did under S. 30 of the Act.

The other point argued in this appeal is that the amount awarded as compensation for the melvaram right to the respondent is excessive. Reference was made to the fact that in the claim made by the respondent she stated that she would be entitled to not less than fifty times the kattubadi payable for the land and it was argued that nothing more than this amount should be awarded namely fifty times the kattubadi. It is however seen that she did claim rights in the land other than the right to collect kattubadi, namely her right of reversion etc. Presumably the words '*et cetera*' would include mining rights. In any case it is not possible to regard the wording of her claim as disqualifying her from receiving what would otherwise be a reasonable compensation for her rights. Paragraph 4 of her claim makes it clear that she claimed the benefit of the rise in the value of land in this locality over and above what was claimed as fifty times the kattubadi. This is not a case in which a party who has been awarded more compensation has disqualified herself from getting it by limiting her claim to a lesser amount.

On the merits there is really no reason to interfere because it has been decided in more cases than one that even as much as one-third of the compensation paid for the entire land can

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be apportioned as the share of the melvaramdar. It is enough to refer to one such case namely *Natesa Aiyar* v. *Kaja Maruf Sahib*[1]. That case is somewhat similar because here also there has been a windfall, the land having risen enormously in value owing to the location of the University at Waltair and the harbour at Vizagapatam. There is no reason why part of the benefit of this enormous rise in value should not go to the melvaramdar. On the merits therefore there is no reason to interfere with the decree or the apportionment made by the Court below. This appeal therefore fails and is dismissed with costs of the respondent.

S. V. V. *Appeal 126 of 1938 dismissed*
Appeals 123 and 133 of 1938 allowed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE ABDUR RAHMAN.

S. Kasi Chettiar .. *Appellant** (*Nil*)

v.

The Rt. Hon'ble the Secretary of State for India in Council represented by the Collector of Ramnad and others .. *Respondents* (*Defendants 1 to 3 and Plaintiff*).

Kasi Chettiar *v.* Secretary of State for India.

Provincial Insolvency Act (V of 1920), Ss. 68 and 75—Insolvent's estate represented by Official Receiver—Official Receiver, whether representative of of the body of creditors—Failure on the part of Official Receiver to prefer an appeal against appellate Court's order confirming a sale by insolvent—Creditor obtaining leave of High Court to prefer the appeal on refusal to appeal by Official Receiver—Whether competent—Analogy of principle in S. 75 whether applicable—Official Receiver whether a trustee accountable to creditors as such—Leave of Court to creditor to prefer appeal—Whether made any difference.

During the pendency of an application to be declared insolvent, a property of the applicant was sold for arrears of income-tax and purchased by the second defendant in 1932 and the sale was subsequently confirmed; but the Official Receiver in whom the assets of the insolvent became vested, filed a suit to get the sale cancelled but the suit was dismissed and on appeal the decision was upheld and thereafter the Official Receiver refused to prefer a further appeal to the High Court against the decree of the appellate Court. One of the creditors of the insolvent applied for leave to the High Court to present an appeal himself and on such leave being granted without notice to the other party, a preliminary objection was taken on behalf of the purchaser and the Secretary of State for India, that the

1. (1926) I.L.R. 50 Mad. 706.

* S. A. No. 1035 of 1937 and C. M. P. No. 5779 of 1940. 5th November, 1940.

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appellant not having been a party to the original suit was not competent to prefer the present appeal,

Held, (1) that the Official Receiver was not a representative of the creditors nor at the same time was it possible for any of the creditors to act independently of him in the manner in which the creditor had done in obtaining leave to prefer an appeal in the case.

(2) In the absence of a provision similar to what is contained in S. 75 of the Provincial Insolvency Act it was not possible to confer a right of appeal by analogy on anybody.

(3) That in the absence of any authority to show, that if a trustee brought a suit, a *cestui que* trust would be in the absence of an assignment as contemplated by O. 22, r. 10, Civil Procedure Code, entitled to prefer an appeal if the trustee failed or refused to file an appeal, the Official Receiver was not competent to file the appeal. The Official Receiver, even otherwise, was not accountable to the body of creditors in that manner.

The Indian Bank Ltd. v. *Seth Bansiram Jeshamal Firm*, (1933) 66 M.L.J. 532: I.L.R. 57 Mad. 670, followed.

Balakrishna Menon v. *Kakkat Manakkal Uma*, (1928) 55 M.L.J. 873: I.L.R. 52 Mad. 263, relied on.

(4) The permission granted to the creditor for prefering an appeal without notice to the other side could make no difference either, as the High Court should be deemed to have granted leave without prejudice to the interests of those against whom the order was passed.

(5) The creditor would have been well advised to go to the Insolvency Court under S. 68 of the Act to apply for a reversal of the refusal of the Official Receiver to prefer an appeal to this Court.

Appeal against the decree of the District Court of Ramnad at Madura in A. S. No. 63 of 1934 preferred against the decree of the Court of the Subordinate Judge (Principal) of Devakottai in O. S. No. 27 of 1933, etc.

K. S. Champakesa Aiyangar for Appellant in S. A. No. 1035 of 1937 and for Respondent in C. M. P. No. 5779 of 1940.

The Government Pleader (*B. Sitarama Rao*), *K. Rajah Aiyar* and *R. Rangaswami Aiyangar* for Respondents in S. A. No. 1035 of 1937 and for Petitioners in C. M. P. No. 5779 of 1940.

The Court delivered the following

JUDGMENT.—Ramaswami Chettiar applied to the Subordinate Judge, Devakottai, on the 2nd November, 1931, to be declared an insolvent (I. P. No. 33 of 1931). He was adjudicated on the 7th July, 1932. While this application was pending a property of his was sold for arrears of income-tax and purchased by the second defendant on the 25th April, 1932. The sale was confirmed on the 4th June, of that year. The Official Receiver of the Ramnad District brought a suit in the

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Court of the Subordinate Judge, Devakottai for the cancellation of the sale (O. S. No. 27 of 1933) on the 6th February, 1933. The suit was dismissed and the decree passed by him was confirmed on appeal by the District Judge of Ramnad on the 13th February, 1937. The Official Receiver refused to prefer an appeal against that decree. One of the creditors, who is the present appellant in this Court, applied to this Court for leave to present an appeal. This was granted on the 25th October, 1937, but without issuing a notice to the opposite party.

A preliminary objection has been taken on behalf of the second defendant as well as on behalf of the Secretary of State that the appellant, not having been a party to the litigation, was not competent to prefer this appeal. The question to decide is if he was entitled so to do. Learned counsel for the appellant urged in the first instance that the Official Receiver represented him and other creditors of Ramaswami Chettiar in O. S. No. 27 of 1933 and on the Official Receiver's failure to prefer an appeal, his client, who was one of the creditors, was competent to do so. The second contention advanced by him was that even if S. 75 of the Provincial Insolvency Act has no application, his client should be held entitled to prefer an appeal on the analogy of that section. The third contention was that the relationship between his client and other creditors on the one side and the Official Receiver on the other was that of a *cestui que* trust and a trustee and in so far as the latter's failure to prefer an appeal against the decree would affect him and other creditors of Ramaswamy adversely he or they should be held competent to bring the litigation, which was carried up to a certain stage by the Official Receiver, to the highest Court of the Presidency and to get a final adjudication in regard to that matter from that Court.

A right of appeal is not a mere matter of procedure. It is a substantive right and is primarily a creature of statute. As such, it can be exercised only by those in whom the power rests either expressly or by necessary implication.

The question to decide is if the appellant can be held to have this right in the absence of any specific provision either in the Code of Civil Procedure or in any other enactment for the time being in force. O. 41, r. 1 of the Code of Civil Procedure does not specify the person who is entitled to prefer an appeal. This led Mr. Champakesa Aiyangar, learned counsel for the

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appellant, to argue that the omission was deliberate and was obviously made with the object of conferring a right of appeal on persons who were not parties to, the suit originally. This may be to a certain extent correct but it cannot possibly lead one to infer that a person, who does not fall within the purview of the provisions of the Code of Civil Procedure or of any other statute conferring that right on him either expressly or impliedly, would be entitled to prefer an appeal from the decision of a suit or other proceeding to which he was not a party. The right to prefer an appeal by parties to a suit can be safely deduced from O. 41, r. 4, Civil Procedure Code, although the object of its enactment was different. The only other provisions of the Code of Civil Procedure to which a reference can be made for this purpose are contained in S. 96, and O. 22, r. 10. The plaintiff does not fulfil the requirements of O. 22, r. 10, Civil Procedure Code. The interests of the Official Receiver cannot be said to have devolved on him during the pendency of the suit. Nor can any interest be said to have been created in his favour or assigned to him during the pendency of the suit which would have entitled him to continue the suit or prefer an appeal. The contention that the Official Receiver represented the creditors when he figures as a plaintiff is not correct. He is a creature of statute in whom the whole estate of the debtor vests for certain purposes. As those purposes are, speaking generally, to liquidate the whole of the debtor's estate, to divide it amongst his creditors to the extent of the debts due to them and to pay the balance, if any, to the debtor himself, he would be representing the interests of the creditors and of the debtor to a very large extent. But to contend that he represents the interests of creditors only is not quite correct. In trying to defend or save the estate for the benefit of the creditors and that of the debtor he has to come into conflict sometimes with the one or sometimes with the other and at times both with the debtor and some of the creditors. It would be therefore incorrect to argue that he represents the interest of all the creditors of an estate at all times. But even if he does so, it would not follow that any creditor can of his own choice replace or cast him as a shadow and usurp the power which the law has conferred on him. He is not an agent of the creditors and cannot for that reason be done away with at the sweet will of one or even of the whole band of creditors.

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He represents larger interests than those of creditors alone and cannot be said to be functioning on their behalf merely. Even if the whole body of creditors of an insolvent estate joined hands and decided to take an action against or on behalf of the estate they would not be able so to do. For the above reasons, I must hold that the Official Receiver is not a representative of the creditors and it is not possible for the creditors to ignore him or act independently of him in the manner in which they have done in this appeal.

It is equally impossible to accept the contention in regard to S. 75 of the Provincial Insolvency Act or the extension of the principle underlying that section and its application to a case like the present by way of an analogy. The considerations which led the legislature to confer a right of appeal not only on the debtors, creditors or on receivers but also on any other person aggrieved by a decision given or an order made in the exercise of insolvency jurisdiction were totally different and have no application when we are dealing with a suit which, being an action in *personam*, determines the rights of the parties who are either actually or in cases such as those where leave is taken or given to sue or be sued or to defend on behalf of or for the benefit of all persons so interested, constructively, before the Court. In the absence of a provision similar to what is contained in S. 75 of the Provincial Insolvency Act, it is not possible to confer a right of appeal by analogy.

As for the contention that the Official Receiver is a trustee on behalf of all the creditors, it may be true that in his dealings with the affairs of the estate he may be accountable as a trustee, but having regard to the facts that he is an officer appointed by the Local Government and no suit could lie against him for a dividend (S. 65) it is difficult to see how he can be said to be a trustee on behalf of the creditors. It cannot be denied that he would be accountable to the Court and any executive act of his or any decision by him is liable to be reversed or modified by the Court, but to say that every creditor and debtor is competent to maintain an action and can compel him to render accounts to each individual would make his situation hopeless and the Act unworkable. No authority has been shown to me by learned counsel for the appellant that he was ever held to be accountable in that manner. Nor has any authority been

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brought to my notice that if a trustee brought a suit, a *cestui que* trust would be in the absence of an assignment as contemplated by O. 22, r. 10, Civil Procedure Code, entitled to prefer an appeal if the trustee fails or refuses to do so. The decision in *Balakrishna Menon* v. *Kakkat Manakkal Uma*[1], was cited by learned counsel for the appellant for a different purpose. But it goes to show that when he comes or is brought to Court, he does so in his personal capacity. He was held by a Division Bench of this Court in that case to be personally liable for costs in the absence of any other direction to the contrary. This would point to the conclusion that the Official Receiver appears in his individual capacity although he may be entitled to be reimbursed by the insolvent's estate later.

I have examined the contentions raised on behalf of the appellant and found them to be devoid of any force. There is a direct decision of a Division Bench of this Court in *The Indian Bank Ltd.*, v. *Seth Bansiram Jeshamal*[2], which is on all fours, or almost so, with the facts of this case and it is quite sufficient to say that in spite of my request to distinguish it on any material fact, learned counsel for the appellant was unable so to do. Even if I were of a contrary opinion, this would have been binding on me, but now that I find myself of the same opinion I respectfully follow it.

The only question then is whether any difference could be made on account of the leave granted to the appellant by this Court in October, 1937. No notice was issued to the respondents and the order by this Court must be regarded to have been passed without prejudice to the interests of those against whom it was passed.

It remains for me to point out that the action taken by the appellant in this case was misconceived. He would have been well advised to go to the Insolvency Court under S. 68 of the Act and to apply for a reversal of the refusal by the Official Receiver to prefer an appeal to this Court and either for a direction to him to appeal against the decree passed by the District Judge of Ramnad or in the alternative for a permission to appeal himself in the name of the Official Receiver.

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1. (1928) 55 M.L.J. 873: I.L.R. 52 Mad. 263.
2. (1933) 66 M.L.J. 532: I.L.R. 57 Mad. 670.

For the above reason the appeal fails and is dismissed with costs—one set of costs to be divided between the first and the second respondents.

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Leave to appeal is refused.

K. C. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PATANJALI SASTRI.

Chidella Veerayya .. *Petitioner* (6th Respondent—8th Creditor)*

v.

Kallam Kotireddi and another. *Respondents (Petitioner—1st Creditor and 5th Respondent).*

Veerayya *v.* Kotireddi.

Provincial Insolvency Act (V of 1920), S. 37—Adjudication—Annulment of—No order then passed under S. 37—Recovery of moneys by a decree-holder—Subsequent vesting order under S. 37—If can affect moneys recovered between date of annulment and revesting—Order rejecting review application—If appealable.

Where a creditor of an insolvent obtained a money decree before the date of adjudication of the debtor, and that adjudication was subsequently annulled by the Insolvency Court under S. 43 of the Provincial Insolvency Act on failure of the insolvent to apply for discharge within the time prescribed and no order was then passed under S. 37, and where after annulment the decree-holder executed his decree and realised the moneys due to him, and after such realisation in execution the Insolvency Court passed an order under S. 37 revesting the properties of the insolvent in the Official Receiver, the amount realised by the decree-holder in execution after the date of the annulment and before the revesting order cannot be affected by such order and should be excluded from its scope.

An order of the Insolvency Court rejecting an application for review is appealable under S. 75 and that provision must be taken to override O. 47, r. 7 of the Civil Procedure Code.

Manak Ram v. *Jugal Kishore*, A.I.R. 1935 Pat. 177, not approved.

Petition under S. 75 of the Provincial Insolvency Act praying that the High Court will be pleased to revise the order of the District Court of Guntur dated 1st October, 1937, and made in C. M. A. No. 70 of 1937 preferred against the order of the Court of the Subordinate Judge of Bapatla dated 30th March, 1937, and made in I.A. No. 1004 of 1936 in I. P. No. 1 of 1934.

K. Krishnamurthi for Petitioner.

N. Rama Rao and *B. V. Ramanarasu* for Respondents.

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* C. R. P. No. 26 of 1938. 8th November, 1940.

Veerayya
v.
Kotireddi

The Court delivered the following.

JUDGMENT.—This is a petition to revise an order of the District Court, Guntur, whereby it modified on appeal the order of the Subordinate Judge, Bapatla, rejecting an application for review. The petitioner obtained a decree for Rs. 700 against certain persons who were subsequently adjudicated insolvents by the Subordinate Judge. As the insolvents did not apply for their discharge within the period specified by the Court in that behalf, the adjudication was annulled on 31st August. 1936. On the 1st of October, 1936, the first respondent herein claiming to be one of the creditors of the insolvents applied for a review of the order of annulment with a view to have the properties of the debtors revested in the Official Receiver under S. 37 of the Provincial Insolvency Act. The learned Subordinate Judge on objection by the petitioner rejected the application holding that the circumstances of the case did not justify the vesting of the properties in the Official Receiver at that stage. Thereupon, the first respondent preferred an appeal to the Court below and the learned District Judge allowed the appeal and passed an order vesting the properties of the debtors in the Official Receiver. The petitioner has challenged the validity of this order on the grounds, firstly, that the appeal to the Court below was incompetent, and secondly, that, in any case, the amount realised by the petitioner in execution of his decree against the debtors after the annulment of their adjudication and before the order of the Court below revesting their properties in the Official Receiver could not be affected by such order and should have been excluded from its scope.

As regards the first point, petitioner's learned counsel relies upon the provisions of O. 47, r. 7, Civil Procedure Code, which provides that an order of the Court rejecting the application for a review shall not be appealable, and argues that, inasmuch as the provisions of the Civil Procedure Code, are made applicable under S. 5 of the Provincial Insolvency Act to proceedings under that Act, the rule referred to above bars an appeal from the order of the learned Subordinate Judge. But it is to be observed that S. 5 makes the Civil Procedure Code, applicable only subject to the provisions of the Provincial Insolvency Act; that is to say, whenever any provision of the Civil Procedure Code, is in conflict with an express provision in the Provincial Insolvency Act, the latter provision will prevail.

Veerayya *v.* Kotireddi.

Now, S. 75 of the Provincial Insolvency Act clearly provides for a right of appeal to the District Court from an order made in the exercise of insolvency jurisdiction by a Court subordinate to it, and this provision must be taken to override O. 47, r. 7 in so far as it bars a right of appeal from an order rejecting an application for review. It follows that the appeal to the lower Court was competent.

The learned counsel for the petitioner, however, called my attention to the decision in *Manak Ram* v. *Jugal Kishore*[1], which no doubt supports his contention. The learned Judges there have taken the view that inasmuch as the power of the Insolvency Court to review its own order is derived only under the provisions of O. 47, r. 1, Civil Procedure Code, read with S. 5 of the Act, r. 7 of that order must necessarily govern the exercise of that power. With all respect, I am unable to agree with this reasoning. While it may be true to say that the power of review derived from the provisions of the Code of Civil Procedure could be exercised only subject to the limitations or restrictions imposed by the Code on the exercise of such power it does not follow that the right of appeal from an order made in the exercise of such power is governed by the provisions of the Code when there is a specific provision in the Provincial Insolvency Act itself governing rights of appeal from orders passed by Courts exercising insolvency jurisdiction, and there is clear indication in the Act, that the latter should prevail over the former in case of conflict.

The question next arises whether the order made by the lower Court revesting the debtors' properties in the Official Receiver ought to have excluded from its operation the amounts realised by the petitioner after the annulment of adjudication and before the date of such vesting order. *Prima facie*, the order revesting the properties of the insolvents in the Official Receiver under S. 37 could only operate in respect of properties which belonged to the insolvents on the date of that order. S. 37 (1) of the Provincial Insolvency Act says:

"Where an adjudication is annulled, all sales and dispositions of property and payments duly made, and all acts theretofore done, by the Court or Receiver, shall be valid; but, subject aforesaid, the property of the debtor who was adjudged insolvent shall vest in such person as the Court may appoint, or, in default of any such appointment, shall revert to the debtor to the extent of his right or interest therein on such conditions (if any) as the Court may, by order in writing, declare."

1. A.I.R. 1935 Pat. 177.

Veerayya v. Kotireddi.

It has been held in this Court in *Baluswami Naidu* v. *Official Receiver, Madura*[1], that an order appointing a person and vesting the debtor's property in such person under S. 37 need not necessarily be made simultaneously with the order of annulment, and can be made even subsequently. But it is clear from that section that unless the Court at the time of the annulment vests the property in a person appointed by it, the property shall revert to the debtor on such conditions as the Court may deem fit to declare. No such vesting order having been made in this case when the adjudication was annulled on 31st of August, 1936 and no conditions having been declared by the Court, the properties of the debtor must be deemed to have reverted to him, and the amount realised by the petitioner by attachment of such property could not be affected by any vesting order subsequently made. It is worthy of note that there is no provision in S. 37 that the vesting of the debtor's property when ordered later should relate back to the date of annulment —*cf.* S. 28 (5).

I hold therefore that the petitioner is entitled to a declaration that amounts realised by him by executing the decree against the debtor's properties after they reverted to him are not affected by the order of the lower Court vesting the debtor's properties in the Official Receiver. The order will be modified accordingly.

Each party will bear his own costs of this revision petition.

S. V. V. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KRISHNASWAMI AIYANGAR.

The Standard Type Foundry by the Proprietor, A. Thiruvengada Mudaliar. *Petitioner* (Defendant)*

v.

Chebolu Venkataramaniah .. *Respondent (Plaintiff).*

Thiruvengada Mudaliar v. Venkataramaniah.

*Madras Village Courts Act (I of 1889), S. 73—Panchayat Court's decision —*Ex parte *decree—Application to District Munsif against decree—Limitation—Whether time taken in applying for and obtaining copy of decree to be excluded in computing time—Limitation Act (IX of 1908), S. 12 (2)—Scope of—Decree copy not accompanying application—Whether under the circumstances S. 12 (2) of the Limitation Act applies.*

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1. (1938) 1 M.L.J. 824.

* C. R. P. No. 706 of 1938. 22nd November, 1940.

Thiru-vengada Mudaliar v. Venkata-ramaniah.

Where in a Village Panchayat Court a suit was filed by the respondent for the recovery of a certain amount due to him by the petitioner, but the petitioner failed to appear on the date of the hearing with the result that an *ex parte* decree was passed against him, and the petitioner moved the Court of the District Munsif under S. 73 of the Madras Village Courts Act, to set aside the decree, on the question whether the time taken in applying for and obtaining a copy of the decree of the Panchayat Court could be excluded in computing the time for limitation for the application to the District Munsif,

Held, that S. 12 (2) of the Limitation Act governed the present case as the petition to the District Munsif should be treated as an appeal for the purpose of the section.

Chidambaram Nadar v. *Rama Nadar*, (1937) 1 M.L.J. 453: I.L.R. 1937 Mad 616 (F.B.), applied.

Held further, that S. 12 (2) is applicable to the present case even though the application was not accompanied by a copy of the decree objected to.

J. N. Surty v. *Chettiar, a Firm*, (1928) 54 M.L.J. 696: L R. 55 I.A. 161: I.L.R. 6 Rang. 302 (P.C.), relied on.

Petition under S. 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the Court of the District Munsif of Rajahmundry dated 6th December, 1937, and made in I. A. No. 934 of 1937 in O. P. No. 33 of 1937 (S. No. 1103 of 1936 on the file of the Second Panchayat Court, Rajahmundry).

K. R. Krishnaswami Aiyar for *S. Panchapagesa Sastriar* and *V. Srinivasan* for Petitioner.

P V. Rajamannar for Respondent.

The Court delivered the following

JUDGMENT.—This is a petition to revise the order of the District Munsif of Rajahmundry made on 6th December, 1937, in I. A. No. 934 of 1937 in O. P. No. 33 of 1937. The petitioner was the defendant in a suit—No. 1103 of 1936—on the file of the Second Panchayat Court, Rajahmundry governed with respect to its jurisdiction and procedure by the provisions of the Madras Village Courts Act, 1888. The respondent instituted the suit for the recovery of a sum of Rs. 24-10-6 alleged to be due to him on dealings. The petitioner entered a defence alleging, firstly, that the Panchayat Court had no jurisdicti n, and, secondly, that the money claimed was not due. He however failed to appear on the date of the hearing with the result that an *ex parte* decree was passed against him on 4th February, 1937. On the 3rd August, 1937, the petitioner moved the District Munsif, Rajahmundry in O. P. No. 33 of 1937, for an order setting aside the decree passed by the

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Panchayat Court on the ground that he was not a resident within the jurisdiction and that the Panchayat Court had therefore no right to entertain the suit against him. This petition was filed under S. 73 of the Madras Village Courts Act. By that section, an application should be presented within sixty days from the date of the decree or order of the Village Court sought to be questioned. Holding that the petition was filed after the expiry of the period of sixty days limited by the section, the District Munsif dismissed the petition. The order of dismissal was passed on the 5th August, 1937. The petitioner then filed an application for review of the order on the 12th August, 1937. He pointed out that he was entitled to have the time taken in applying for and obtaining a copy of the decree of the Panchayat Court excluded under S. 12 of the Indian Limitation Act. If the time so taken is excluded, the petition was admittedly within time.

The learned District Munsif refused to exclude the time taken in obtaining the copy of the decree on the ground that the petition did not fall within S. 12 (2) of the Indian Limitation Act which is the only provision on which the petitioner relied. S. 12 (2) is as follows:

> "In computing the period of limitation prescribed for an appeal, an application for leave to appeal and an application for a review of judgment, the day on which the judgment complained of was pronounced, and the time requisite for obtaining a copy of the decree, sentence or order appealed from or sought to be reviewed, shall be excluded."

In the view of the learned District Munsif, a petition under S. 73 of the Madras Village Courts Act cannot be regarded as being comprehended within the term, 'appeal' occurring in the section. It cannot certainly be regarded as being covered by the other heads mentioned in the section. He was of the opinion that the District Munsif is not a Court of appeal from a decision of the Village Court within the meaning of the Act and that the marginal note to the section made it further plain that the petition was of the nature of a revision petition rather than an appeal.

In taking this view, the learned District Munsif appears to my mind to have attached a too narrow meaning to the word, appeal, in the section. It has been held in a Full Bench decision of this Court reported in *Chidambaram Nadar* v. *Rama Nadar*[1], that the term, appeal, occurring in Art. 182 (2) of the

1. (1937) 1 M.L.J. 453: I.L.R. 1937 Mad. 616.

Thiru-vengada Mudaliar v. Venkata-ramaniah.

Limitation Act is not used in a restricted sense so as to exclude revision petitions and the expression, appellate Court, in the said article is not confined to a Court exercising appellate as opposed to revisional powers. The learned Judges support this view by the decisions of the Privy Council referred to at p. 625 of the report. It is difficult to say that the remedy by way of revision is essentially different from the remedy by way of appeal, though in the former case, the grounds of interference may be less wide. I am not able to see any reason why the same liberal construction should not be applied in the present case and the petition to the District Munsif treated as an appeal for the purpose of S. 12 (2).

A subsidiary point may also be noticed, S. 73 does not require an applicant to produce along with his petition a certified copy of the decree to which he takes exception. There is possibly some reason for the view that a party is not to be permitted to exclude the time taken in obtaining a certified copy of an order or decree wholly unnecessary for the purpose of an application under S. 73 but this argument is rendered untenable by the decision of the Privy Council in *J. N. Surty* v. *Chettiar, a Firm*[1], where the question has been fully discussed and the rule laid down that S. 12 (2) is applicable even to a case where the appeal or application need not be accompanied by a copy of the decree objected to.

In the result, the revision petition is allowed with costs and the District Munsif is directed to restore O. P. No. 33 of 1937 on his file and dispose of it according to law.

K. C. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

V. K. R. S. T. Narayanan Chettiar (dead) and others. *Appellants** (*Plaintiff and his L. Rs.*)

v.

The Right Hon'ble the Secretary of State for India in Council through the Collector of Ramnad at Madura and others. *Respondents* (*Defendants*).

Narayanan Chettiar v. Secretary of State for India.

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1. (1928) 54 M L.J. 696 : L R. 55 IA 161 : I L.R. 6 Rang. 302 (P.C.).

* S. A. No. 351 of 1937. 8th March, 1940.

Narayanan Chettiar v. Secretary of State for India.

Revenue Recovery Act (II of 1864), S. 38 (3) and S. 59—Setting aside of sale by Collector—Sale originally confirmed by Sub-Collector—Regulation VII of 1828—Direct evidence for setting aside of sale whether necessary—Circumstances for interference by Civil Court.

All that is necessary under S. 38 (3) of the Revenue Recovery Act before setting aside the sale is that the Collector should have reason to think that the sale ought to be set aside; so that, if the Collector gives any substantial reasons why a sale should be set aside, his order is good. It is not necessary that he should find that there was a material irregularity; it is not necessary that he should find that the price was unduly low. Still less is it necessary that the Collector should come to the conclusion that the lowness of the price was a direct result of some material irregularity.

Where the executive authority acts in some illegal or improper or arbitrary manner then and then only could a Civil Court interfere with the order passed. Where, for example, there was ample evidence before the Collector to justify the setting aside of the sale under S. 38 (1), it is difficult to believe that the Legislature intended that the Civil Court could set aside that order, merely because the petitioner had failed to adduce all such evidence before it.

Appeal against the decree of the Court of the Subordinate Judge, Devakottai in A. S. No. 16 of 1936 preferred against the decree of the Court of the District Munsif of Devakottai in O. S. No. 81 of 1934.

T. K. Sundararaman for Appellants.

The Government Pleader (*B. Sitarama Rao*) and *K. Raja Aiyar* for Respondents.

The Court delivered the following

JUDGMENT.—On the 31st December, 1932, the share of the third defendant in a house and garden was brought to sale by the Revenue authorities because of his failure to pay income-tax. The third defendant's share is said to be worth Rs. 17,000. It was actually sold for Rs. 800. On 23rd February, 1933, the Sub-Collector, in the absence of any application to set aside the sale, confirmed it. The second defendant, a creditor of the third defendant, had attached the same property in execution of a money decree on the 31st March, 1933 and on the same date he filed an application before the Collector under Regulation VII of 1828. The Collector, exercising his powers of revision set aside the order of the Sub-Collector of the 23rd February, 1933, confirming the sale. The Collector was of opinion that two material irregularities had been committed (1) an incomplete description of the third defendant's interest in the house and garden and (2) that the property had been sold in one lot instead of the garden and the portion of the house being sold

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separately. He also found that the property had fetched a very low price; but he did not say that the low price was a result of these material irregularities. The present appellant thereupon filed this suit on the 2nd April, 1934, under S. 59 of the Revenue Recovery Act to have the Collector's order set aside and the sale confirmed. Both the trial Court and the lower appellate Court found that there was a material irregularity in the description of the third defendant's share of the garden and drew the conclusion, which they considered to be reasonable under the circumstances, that the low price was the direct result of the material irregularity.

It is here argued that there is no evidence that the low price resulted from the material irregularity and S. 38 (1) of the Revenue Recovery Act has been referred to show that it is necessary before setting aside a sale that the Collector should be satisfied that a substantial injury resulted from the irregularity and that the lower Courts were not justified in coming to the conclusion which they did in the absence of direct evidence. *Macnaghten* v. *Mahabir Pershad Singh*[1] and *Tasadduk Rasul Khan* v. *Ahmad Husain*[2], decisions of the Privy Council have been referred to as indicating that some direct evidence is necessary. In these cases, especially in the former, there was no particular reason why the Court should have concluded that the irregularity was likely to lead to any substantial loss; but *Tasadduk Rasul Khan* v. *Ahmad Husain*[2], contains a passage at page 70 which supports the argument of the learned advocate for the appellant. It runs as follows:

"Their Lordships cannot accept the judgment of the Judicial Commissioner that loss is to be inferred from the mere fact that a sale was had without full compliance with the provisions of S. 290. The section clearly contemplates direct evidence on the subject,"

the words 'direct evidence' apparently being used in contradistinction to circumstantial evidence.

I do not however consider it necessary to decide whether the wording of S. 38 (1) prohibits the deduction of an inference, in the absence of direct evidence, that a low price was a direct result of the irregularity; for the order passed by the Collector was not one under S. 38 (1) of the Revenue Recovery Act. Under Regulation VII of 1828 the Collector has power to delegate his authority in certain matters; and the

1. (1882) L.R. 10 I.A. 25: I.L.R. 9 Cal. 656 (P.C.).
2. (1893) L.R. 20 I.A. 176: I.L.R. 21 Cal. 66 (P.C.).

Sub-Collector in bringing this property to sale under the Act, was exercising such a delegated authority. That Regulation empowers the Collector to control the acts of the Sub-Collector in exercise of that delegated authority by revising the orders of the Sub-Collector. When the Collector acted on the petition of the second defendant, he was revising the order of the Sub-Collector confirming the sale. So that the position after the Collector had exercised his revisional power was that the sale had not been confirmed. If therefore the Collector was to set aside the sale at all, he could act only under S. 38 (3); for no application under S. 38 (1) had been filed. The terms of S. 38 (3) are very much wider than those of S. 38 (1), and the sale can be set aside for very many more grounds than under S. 38 (1). All that is necessary under S. 38 (3) before setting aside the sale is that the Collector should have reason to think that the sale ought to be set aside; so that if the Collector gives any substantial reasons at all why a sale should be set aside his order is good. It is not necessary that he should find that there was a material irregularity; it is not necessary that he should find that the price was unduly low. Still less is it necessary that the Collector should come to the conclusion that the lowness of the price was a direct result of some material irregularity.

In this view, it is unnecessary to consider the scope of a suit under S. 59. S. 59 is worded very widely and does afford some ground for an argument that the Civil Courts have the same freedom in considering all the evidence relating to the conduct of the sale and the reasons for setting it aside as the Collector had in the first instance under S. 38. If this is so, the Civil Court sits in appeal over the decision of the Collector. It is however difficult to think that this is what was intended by the Legislature. There is no direct authority bearing on this question under the Revenue Recovery Act; but the general principle underlying such provisions found in such legislation is that members of the public should have some protection against illegal and arbitrary acts of executive officers. These provisions are not intended to set up Civil Courts as appellate authorities over the lawful acts of Government servants done in good faith. Where it can be but a matter of opinion whether there were sufficient grounds for the act of the executive authority, there would be no reason for interfering with the

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executive order; for the opinion of the executive officer on the merits of the application before him would be entitled to as much weight as the opinion of a Civil Court. Where the executive authority acts in some illegal or improper or arbitrary manner, then and then only, in my opinion, could a Civil Court interfere with the order passed. Where, for example, there was ample evidence before the Collector to justify the setting aside of a sale under S. 38 (1), it is difficult to believe that the Legislature intended that the Civil Court could set aside that order merely because the petitioner had failed to adduce the same evidence before it.

This point is only of academic interest in this case, however, for both the Courts have here found that there was a material irregularity in the proclamation by which the half share of the third defendant in the house and gardens was to be sold. It is true that it did not say that the portion was undivided; but the description was so vague that intending purchasers might well have apprehended, even if they knew what the third defendant's share was, that if they had purchased the property and obtained a sale certificate in the terms of the proclamation, more litigation would have been necessary before they could secure peaceful enjoyment of the property. The third defendant actually owned the northern half of the house in question and the whole of one of three gardens; so that there was good ground for the finding of the Courts below that there was a material irregularity in the proclamation which amounted to a sufficient cause for setting aside the sale.

The appeal therefore fails and is dismissed with costs (two sets). The Advocate's fees will be fixed at Rs. 35 each.

K. C. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KING AND MR. JUSTICE PATANJALI SASTRI.

Marina Ammayi .. *Petitioner* (Respondent)*

v.

Mirza Bakhar Beg Saheb and others. *Respondents (Petitioners).*

Marina Ammayi v. Mirza Bakhar Beg Saheb.

Madras Agriculturists' Relief Act (IV of 1938), Ss. 8 and 19—Preliminary decree for redemption in suit by agriculturist mortgagors impleading non-agriculturist purchasers of portions of hypotheca as co-plaintiffs—Scal-

* C. R. Ps. Nos. 1330 and 1331 of 1939. 19th December, 1940.

Marina Ammayi v. Mirza Bakhar Beg Sahib.

ing down—Decree discharged as against mortgagors by reason of the damdupat *rule—Effect on liability of the non-agriculturist co-plaintiffs.*

The mortgagors who had executed a mortgage in 1914 filed a suit for redemption impleading the purchasers of items of the hypotheca as co-plaintiffs and a preliminary decree for redemption on payment of a certain amount was passed. The mortgagors were agriculturists and the purchasers of the hypotheca were non-agriculturists. When the mortgagors got the decree scaled down, more than twice the principal amount having been paid the decree stood discharged. In the circumstances,

Held, that satisfaction can be entered for the decree as a whole even as against the purchasers of items of the hypotheca who were non-agriculturists.

Ramier v. Srinivasiah, (1940) 2 M.L J. 872, distinguished.

Petitions under S. 115 of Act V of 1908 praying that the High Court will be pleased to revise the orders of the Court of the Subordinate Judge of Rajahmundry dated 6th January, 1939 and made in I. A. Nos. 221 and 233 of 1938 respectively in O. S. No. 49 of 1930.

G. Chandrasekhara Sastri for Petitioner.

T. Satyanarayana and *V. Govindarajachari* for Respondents.

C. R. P. No. 1330 of 1939.

The judgment of the Court was delivered by

Patanjali Sastri, J.

Patanjali Sastri, J.—This revision petition arises out of an application under S. 19 of Madras Act IV of 1938 to scale down a preliminary decree for redemption passed by the Subordinate Judge of Rajahmundry.

The plaintiffs 2, 3, 4 and 6 were the petitioners in the Court below and are respondents here. They had executed a mortgage in 1914 and in a suit to redeem the mortgage the Court has passed the preliminary decree declaring that the amount due to the mortgagee calculated up to the 30th March, 1937, the date fixed for redemption, was Rs. 16,245-6-3. On the application of the respondents to scale down the decree, the Court below has found that they are agriculturists and that the amount already paid to the decree-holder (petitioner herein) was more than twice the principal sum payable by the respondents under the mortgage. The Court has therefore ordered under S. 19 read with S. 8 of the Act that full satisfaction of the decree as a whole be entered, holding that there could be no question of any partial amendment of the decree.

It is argued for the decree-holder that some of the other judgment-debtors who are purchasers of portions of the

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Patanjali Sastri, J.

hypotheca are non-agriculturists and that the Court below ought not to have entered full satisfaction of the decree even as against them as they are not entitled to the benefits of the Act. The case reported in *Ramier* v. *Srinivasiah*[1], is relied on in support of this contention. That decision no doubt recognised that a decree could be scaled down in favour of a judgment-debtor who was an agriculturist and left intact as against a non-agriculturist judgment-debtor and it was accordingly held that a puisne mortgagee who was an agriculturist and a party to the decree on a prior mortgage should be given an opportunity to redeem on payment of the decree amount as scaled down but that, on his failure to pay such amount within the time allowed, the decree-holder should be entitled to bring the whole of the mortgaged property including the puisne mortgagee's interest to sale. This procedure was indicated as appropriate in the circumstances of that case to give to the agriculturist judgment-debtor the full benefit of the relief to which the Act entitled him while safeguarding the right of the decree-holder as against the non-agriculturist mortgagor judgment-debtor. But that decision, it seems to us, is not applicable to the facts here. The respondents who are agriculturists brought the suit as mortgagors to redeem the mortgage impleading purchasers of portions of the hypotheca as co-plaintiffs and redemption has been decreed on payment of a certain sum which must now be deemed to have been paid. How then can redemption of the mortgage as a whole be denied to them? The Court below has found that the purchasers hold the moneys reserved with them for payment to the mortgagee as "mere custodians" for the mortgagors, and it may be that the respondents would be entitled to recover any portion of the purchase money which as a result of the scaling down of the decree, the purchasers will not have to pay to the mortgagee. See *Ragunatha* v. *Sadagopa*[2]. In such circumstances the Court by entering satisfaction of the decree as a whole would only be allowing to the agriculturist mortgagors the full benefits of the Act and not necessarily benefiting the non-agriculturist purchasers of portions of the hypotheca. It follows that the order of the Court below is correct though the view expressed by the learned Judge that there could not be any partial amendment of a

1. (1940) 2 M.L.J. 872.
2. (1911) 21 M.L.J. 983: I.L.R. 36 Mad 348.

Marina Ammayi v. Mirza Bakhar Beg Saheb.

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decree under the Act must be held to be erroneous in view of the decision in *Ramier* v. *Srinivasiah*[1].

The Civil Revision Petition is dismissed with costs.

C. R. P. No. 1331 of 1939.

This revision petition arises out of an application made by the first plaintiff (mortgagor) to scale down the same decree so far as it relates to the mortgage under Ex. III dated 23rd November, 1927. The Court below has found that the mortgagor, the respondent herein, is an agriculturist and scaled down the amount declared to be due under the decree for redemption to Rs. 18,000.

For the reasons indicated in our judgment in C. R. P. No. 1330 of 1939, this Civil Revision Petition also fails but we make no order as to costs.

K. S. *Petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE ABDUR RAHMAN.

Syed Ghouse Sahib and others .. *Appellants** (*Defendants*)

v.

G. Mohamood Khan Sahib (deceased) and others .. *Respondents* (*Plaintiff and Nil*).

Syed Ghouse Saheb v. Mohamood Khan Saheb.

Madras Estates Land Act (I of (1908), S. 56—Ryots in possession of joint holding—Pattas not tendered to all the ryots—Suit to enforce acceptance of patta—Maintainability.

The right of suit to enforce acceptance of patta arises to a landlord only after the patta has been tendered to the ryot and, if the holding is joint, to the several ryots who hold the same jointly. One of the joint pattadars cannot be held to be the agent of the others for acceptance of pattas. A suit under S. 56 of the Estates Land Act is not maintainable when pattas were not tendered to all the ryots in possession of a joint holding.

Appeal against the decree of the District Court of Salem dated the 12th February, 1935 and passed in A. S. No. 180 of 1933 preferred against the decree of the Court of the Deputy Collector of Dharmapuri Division in S. S. No. 65 of 1931.

C. S. Venkatachariar and *D. Ramaswami Aiyangar* for Appellants.

B. Pocker for Respondents.

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1. (1940) 2 M.L.J. 872.

* S. A. No. 391 of 1935, 8th November, 1940.

Syed Ghouse Saheb v. Mohamood Khan Sahib.

The Court delivered the following

JUDGMENT.—The only question to determine in this appeal relates to the maintainability of the suit instituted under S. 56 of the Estates Land Act when pattas were not tendered to all the ryots who were in possession of a joint holding. The facts which led to this appeal are simple and may be briefly stated.

A patta was tendered on behalf of the plaintiff landholder to defendant 1; but he declined to accept the same. A suit S. S. No. 65 of 1931 was therefore brought by the landholder under S. 56 to enforce the acceptance of the patta against the first defendant alone. The suit was defended on various grounds, one of which related to the maintainability of the suit. It was contended that the land in respect of which the patta was being attempted to be enforced was a joint holding held by the first defendant along with certain other persons and that the suit could not proceed in their absence. This contention prevailed and the suit was dismissed by the Deputy Collector of Dharmapuri. An appeal was taken against that decree of dismissal to the District Judge of Salem. But before it was heard a compromise was arrived at and a joint memorandum was presented on behalf of the parties. This was accepted by the District Judge and the suit was ordered to be remanded. The first paragraph of the order of remand passed by that officer reads as follows:

"In S. S No. 65 of 1931 the plaintiff should implead the other joint owners mentioned in the written statement and then proceed with the suit."

On the receipt of record by the trial Court, the 'joint owners mentioned in the written statement' were impleaded by the plaintiff as defendants. On appearance before the Deputy Collector in obedience to the summons issued by him the latter urged that the suit was not maintainable against them as the pattas were not tendered to them before the institution of the suit. This fact was admitted but both the lower Courts overruled the contention. The other objection raised on behalf of the defendants was that of jurisdiction of the Revenue Courts to entertain a claim in regard to this holding. It was claimed to be a rent free service inam granted by Tippu Sultan for the up-keep of a mosque and as such not covered by the Estates Land Act. But, in view of the opinion that I have formed in regard to the first question, it is unnecessary for me to go into the second objection.

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S. 56 of the Estates Land Act reads as follows:

"When a ryot for one month after tender fails to accept the patta tendered to him and to give a muchilika in exchange, the landholder may sue before the Collector to enforce acceptance of such patta."

A perusal of the section would show that the tender of patta is a condition precedent without which a suit under the section cannot be held to be maintainable. The right of suit arises to a party only after the patta has been tendered by him to his ryot and, if the holding is joint, to the several ryots who hold the same jointly. No case was brought to my notice under this section, but two decisions under S. 9 of the Rent Recovery Act (Act VIII of 1865) which was the predecessor of the present Estates Land Act, were cited by learned counsel for the appellant (See *Sayud Chanda Miah Sahib* v. *Lakshmana Aiyangar*[1] and *Saminatha* v. *Viranna*[2].) The language of S. 9 of the Rent Recovery Act, is almost identical with the present S. 56 of the Estates Land Act, and these two decisions take the same view which I am inclined to take on a perusal of S. 56 of the Act. It must therefore be held that the plaintiff had no right of suit against the defendant on whom the patta was admittedly not served.

What is the effect of this omission, then, on the first defendant? If the holding was a joint one, and the defendants were, as admitted in the joint memorandum presented to the District Judge, Salem, joint owners, a service of patta on one of them could not be in the absence of any allegation and proof of his agency on behalf of the others, regarded as sufficient. The word 'ryot' although used in singular in S. 56 would cover all the ryots who were holding the land jointly as the singular according to the General Clauses Act includes the plural. It was held in *Fisher* v. *Ramaswami Udayan*[3], that the tender of a patta to one of several joint pattadars is not a sufficient tender under S. 9 and one of the joint pattadars cannot be held to be the agent of the others.

A feeble attempt was made before me to show that these defendants were not joint pattadars. But this was not seriously questioned before. Had they not been joint pattadars, the suit would not have been dismissed by the Deputy Collector on that ground in the very beginning. Moreover the fact that these

1. (1876) I.L.R 1 Mad. 45. 2. (1889) I.L.R. 13 Mad. 42.
3. (1904) I.L.R. 28 Mad. 393.

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were joint owners was, as observed before, admitted by the plaintiff when he signed the joint memorandum and presented the same to the District Judge, Salem.

The next contention raised by Mr. Pocker, learned counsel for the respondent, was that in order to ascertain the maintainability of the suit it is not proper to travel beyond the allegations contained in the plaint. The proposition was somewhat broadly stated and it is not possible to accept it in the manner in which it was put. When an objection as to jurisdiction or as to the frame of a suit is raised by defendants or the Court has to see whether a plaint discloses any cause of action it will have, in order to determine these questions, to assume the correctness of the statements made by the plaintiff in his plaint and proceed to examine the objections on that basis. And this is exactly what I am trying to do. A tender of patta in a suit under S. 56 of the Estates Land Act, like a notice for ejectment in a suit for eviction of a tenant by a landlord such as required by S. 106 of the Transfer of Property Act, is a condition precedent, without alleging which, a complete cause of action cannot be said to have accrued in favour of the plaintiff; and when it is found that it was not alleged, not because the plaintiff had omitted to say so by a mistake in which case the plaint could be amended, but as the plaintiff had failed to comply with the condition which would have entitled him to maintain the action, the objection is not to the form merely but is more substantial and goes to the root of the case.

The third contention raised by learned counsel for the respondent was that once a suit was instituted, the Court was seized of the whole procedure and the suit could not fail on a technical ground such as raised by the defendants. What the learned counsel intended to urge was that once a person or persons is or are impleaded under the orders of a Court (although the order may have been passed in accordance with the request of one or both the parties to the litigation), the mandatory provisions of S. 56 of the Estates Land Act, and similarly of S. 106 of the Transfer of Property Act, must be taken to have been dispensed with and can have no application to the parties so added. The contention is in my opinion wholly unsound. No Court has the power to overlook the provisions of a statute, the compliance of which alone could confer the right of suit on the plaintiff. Even if the Court had ordered

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the joint owners to be impleaded *suo motu*, it would have been impossible to hold that its action had done away with the compliance of the provisions contained in S. 56 of the Estates Land Act. The Court did have the power to implead a party but had no power to exempt the plaintiff from carrying out his statutory obligations. These had to be performed in any case—and the more so when certain defendants were added on his own application.

For the above reasons, I must accept the appeal and setting aside the decision of both the Courts below dismiss the suit. But having regard to the technical nature of the plea, I would leave the parties to bear their own costs throughout.

Leave refused.

K. S. *Appeal accepted.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PATANJALI SASTRI.

Vinjamuri Venkatanarasimhacharyulu .. *Petitioner** (*Plaintiff*)

v.

Jami Gangaraju (amended as) Ganiraju .. *Respondent* (*2nd Defendant*).

Venkatanarasimhacharyulu v. Gangaraju.

Evidence Act (I of 1872), S. 116—Applicability—Demise of land as owner—Part of property really belonging to adoptive mother of lessor—Suit for rent—Payment of rent to real owner—Whether can be pleaded by lessee.

The plaintiff sued for recovery of rent payable under a registered *kadapa* executed by the defendant. It appeared that the property leased consisted partly of lands belonging to the plaintiff and partly of lands belonging to his adoptive mother which were under his management. The *kadapa* however recited that the properties leased were in the absolute possession and enjoyment of the plaintiff and contained a covenant by the defendant to pay rent to the plaintiff. The defendant pleaded that part of the rent had been paid to the plaintiff's adoptive mother who was the owner of the property,

Held, that the defendant was estopped under S. 116 of the Evidence Act from denying that the plaintiff had title to the entire property covered by the lease and that defendant could not be allowed to allege and prove the contrary and set up a plea of payment to the real owner.

Kuppa Konan v *Thirugnana Sambandam Pillai*, (1908) I.L.R. 31 Mad. 461, considered.

Petition under S. 25 of Act IX of 1887 praying that the High Court will be pleased to revise the decree of the Court of the District Munsif of Kovvur in S. C. S. No. 190 of 1936.

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* C. R. P. No. 1664 of 1937. 30th August, 1940.

P. Somasundaram and *P. Suryanarayana* for Petitioner.

V. Rangachari for Respondent.

The Court delivered the following

JUDGMENT.—This revision petition raises an interesting question of law on which it is said there is no direct authority.

The petitioner brought the suit for recovery of the first year's rent payable under a registered *kadapa* executed by the respondent on 23rd May, 1935, for a term of five years. The defence was that out of the 5 acres 40 cents covered by the *kadapa* (Ex. A), 4 acres and 10 cents belonged to the petitioner's adoptive mother, that the petitioner who was managing her properties on her behalf leased the said 4 acres and 10 cents along with 1 acre and 30 cents of his own land, describing the entire property as his own, that part of the rent proportionate to the extent belonging to her was paid and accepted by the petitioner's adoptive mother and that the balance had been paid to the petitioner. The *kadapa* recites that the properties leased were in the absolute possession and enjoyment of the petitioner and contains a covenant by the respondent to pay the rent to the petitioner. There can be no doubt therefore that the respondent took the lease from the petitioner as the absolute owner of the properties leased. It has, however, been found as a fact by the Court below that the petitioner had been managing the properties of his adoptive mother, that 4 acres and 10 cents out of the land comprised in the lease belonged to her and that the respondent had made payments as alleged by him. On these findings the Court below held that there was no estoppel and dismissed the suit.

The petitioner's learned counsel contended that the respondent was estopped under S. 116 of the Evidence Act from denying that the petitioner had title to the entire property covered by the lease, and that the lower Court was wrong in allowing the respondent to allege and prove the contrary. It was, however, argued for the respondent that the rule of estoppel laid down in S. 116 of the Evidence Act does not preclude the tenant from showing that, in granting the lease, the landlord acted as the agent of another person who was the owner of the property but without disclosing his agency, and that the liability to pay the rent was discharged by payment to that owner. Learned counsel relied on Woodfall on Landlord and Tenant pages 90 and 91 as showing that the principle

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applicable to contracts made by an undisclosed agent (*see* S. 231 of the Indian Contract Act) applies also to contracts of tenancy. It may be that, according to this principle, the real owner could sue to enforce the covenant for payment of rent but it would be open to the tenant in such a suit to apply to have the agent, that is, the lessor under the instrument, also impleaded as a party so as to have all questions regarding the right to rent completely settled in the suit and thus safeguard himself against having to pay the rent twice over. However that may be, it is difficult to see, how the fact, that the undisclosed principal is also entitled to sue for the rent in a case of this sort, can be a ground for permitting the tenant to plead discharge by payment to the former, as that would be contrary to the rule of estoppel laid down in S. 116 of the Evidence Act; for he cannot establish such a plea without showing that the person to whom he paid the rent and not his lessor was the owner of the property leased, which is exactly what the estoppel is intended to prevent him from showing.

Learned counsel for the respondent placed reliance on *Kuppa Konan* v. *Thirugnana Sambandam Pillai*[1], where it was held that in the case of a lease executed in favour of a person benami for another, the real owner and not the benamidar must be regarded as the landlord for the purposes of S. 116 of the Evidence Act. The facts of the case do not clearly appear in the report but it seems to me that a distinction must be made between a case where a person claiming to be the owner of a certain property leases it to a tenant but takes the lease deed in the name of his benamidar and the case where a benamidar happening to be in possession of the property on behalf of the real owner grants a lease of it without disclosing his benami character. In the former case it may be correct to say that the tenant's estoppel operates in favour of the real lessor and not the benamidar who was not a party to the transaction. The decision in *Kuppa Konan* v. *Thirugnana Sambandam Pillai*[1], was apparently a case of that kind. But in the second case referred to above, the benamidar clearly comes within the protection of S. 116 as he was the person who in fact leased the property and placed the tenant in possession. If the proposition laid down in *Kuppa Konan* v. *Thirugnana Sambandam*

1. (1908) I.L.R. 31 Mad. 461.

Pillai[1], was intended to apply also to this class of cases, I would respectfully dissent from it.

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In the result, the revision petition is allowed with costs and the petitioner will have a decree for the amount claimed less the sum found to have been paid to him. The parties are agreed that the sum payable on this basis is Rs. 162. There will be a decree accordingly for this sum with interest at 6 per cent. from date of suit. The parties will pay and receive proportionate costs in the lower Court.

B. V. V. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE ABDUR RAHMAN.

Ramachandra Aiyar (deceased) and others. *Appellants* (1st Defendant and Nil)*

v.

Ranganayaki Ammal and others .. *Respondents (Plaintiffs and 2nd Defendant).*

Ramachandra Aiyar v. Ranganayaki Ammal

Hindu Law—Bequest by father to sons—Limited interest alone conferred—Sons whether take as joint tenants or as tenants-in-common.

Where a Hindu father bequeaths properties to his undivided sons he can determine whether the property so bequeathed shall be ancestral or self-acquired in the hands of the sons; in the absence of any such declaration or of any circumstance which would point to a contrary intention it would be presumed to be ancestral. In such a case the fact that the sons had got a limited interest only in the property bequeathed to them would not rebut the presumption of joint tenancy.

Suraj Prasad v. *Mt. Gulab Dei*, A.I.R. 1937 All. 197 (2) relied on.

When a gift is made by a father to his sons, the presumption of joint tenancy is stronger.

Janakiram Chetty v. *Nagamoni Mudaliar*, (1925) I.L.R. 49 Mad. 98, relied on.

Appeal against the decree of the Court of the Subordinate Judge of Salem in A. S. No. 152 of 1934 (A. S. No. 111 of 1934 District Court, Salem) preferred against the decree of the Court of the District Munsif of Krishnagiri in O. S. No. 312 of 1930.

B. V. Visvanatha Aiyar for Appellants.

D. R. Krishna Rao for Respondents.

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1. (1908) I.L.R. 31 Mad. 461.

* S. A. No. 107 of 1936. 16th January, 1941.

Rama-chandra Aiyar v. Ranga-nayaki Ammal.

The Court delivered the following

JUDGMENT.—The main point to be decided in this appeal relates to the character of the property held by Varada Pillai defendant No. 2. His father Vijayaraghava executed a will (Ex. B) on the 29th April, 1918 under which he bequeathed the property to his sons for enjoyment during their lives. It also provided against the alienations of this property by them but contained a clause that his grandchildren could do so after the property devolved on them subsequent to his sons' death. It contained a further provision for charity as well; but we are not at present concerned with the property which was reserved for charity or with the right and duty of conducting the same.

Vijayaraghava had three sons at the time when the will was executed, Thiruvengada Pillai, Varada Pillai and Krishna Pillai but the youngest of these (Krishna Pillai) died during his lifetime. Vijayaraghava died in October, 1918, and the eldest son of his, Tiruvengada, five years later.

Varada Pillai, the second defendant, entered into a partnership with the first defendant and carried on business for some time. They could not pull on satisfactorily and the first defendant brought a suit for dissolution of partnership and rendition of accounts in the Court of the District Munsif of Dharmapuri (O. S. No. 73 of 1926). A preliminary decree was passed and after the accounts were taken some money was found due to him by Varada Pillai. A final decree was consequently passed in favour of the first defendant. In execution of that decree he brought the properties in suit to sale and purchased them himself. The present plaintiffs 1 and 2 who are the daughters of Thiruvengada Pillai and the 3rd plaintiff who is the daughter of Varada Pillai brought the present suit asking for a declaration that they were the owners of the properties purchased by the first defendant and the first defendant had not acquired any proprietary rights in them by reason of his purchase through Court. The plaint also contained a prayer in the alternative that if Varada Pillai was found entitled to a third share of the income from the lands for his life time subject to the liability with which the said right was burdened under the will, that the first defendant should not get anything more than his (Varada Pillai's) right of enjoyment in a third of the suit properties during his life time. A prayer for injunction restraining the first defendant from interfering with the plaintiffs' possession

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of the suit properties was also included. The first defendant pleaded that the properties were the joint properties of Vijayaraghava and his sons and that the will of Vijayaraghava was for that reason invalid. The second objection raised by him was to the effect that the will was cancelled by Vijayaraghava during his lifetime and the cancellation was recorded on the back of the original will. The third plea, which is really the main plea in this appeal, was that the property was taken by Vijayaraghava's sons under the will as joint tenants and devolved on Varada Pillai as a survivor after the death of his brother Thiruvengada which he was entitled to enjoy for his life time in any case. The District Munsif of Krishnagiri held on the last the two points against the plaintiffs and dismissed their suit. On appeal to the Subordinate Judge of Salem this judgment was reversed and the plaintiffs' suit was decreed. Aggrieved by that judgment and decree the first defendant has come up to this Court in second appeal.

As observed by their Lordships of the Privy Council in *Lal Ram Singh* v. *Deputy Commissioner of Pratabgarh*[1], there is a great diversity of opinion in the High Courts in India as to the effect in a Mitakshara family of a bequest by a father of property, which in the father's hand was self-acquired to his son. No final decision was however arrived at by them and in the absence of any such decision the view consistently taken by this Court is that the father can determine whether the property which he has bequeathed shall be ancestral or self-acquired and that in the absence of any such declaration or of any circumstances which would point to a contrary intention, it would be presumed to be ancestral. This was conceded by learned counsel for the respondents but he urged that the presumption is rebutted by the provisions in this will which indicate that Vijayaraghava did not wish to bequeath the property to his sons as ancestral property. Having gone through the will, with him I am of opinion that there is no force in this contention. There is nothing in this document which would show that Vijayaraghava did not want the property to devolve on his sons as ancestral property. The learned Subordinate Judge, on a wrong construction of this will, arrived at the conclusion that Thiruvengada's daughters would take their father's share of the property during the life time of their uncle Varada Pillai.

1. (1923) 47 M.L.J. 260: I.L.R. 45 All. 596 (P.C.).

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Had this been so in fact, the presumption would have been rebutted and the decision of the lower Appellate Court would have been correct. But unfortunately for the respondents it is not so. There is nothing in the will to show that the property bequeathed by Vijayaraghava or any share thereof devolved on Thiruvengada's children on their father's death. The facts that the shares were not specified in the will or the right of management was not given by Vijayaraghava to any one of his sons do not point to the inference that the father did not want the sons to enjoy the property as ancestral. The fact that the sons had got a limited interest only in the property bequeathed to them would not also rebut the presumption of the joint tenancy. This was held by a Division Bench of the Allahabad High Court in *Suraj Prasad* v. *Mt. Gulab Dei*[1], and this in spite of the fact that the view of that Court has been against the presumption as to the ancestral character of the property when bequeathed by a father which is raised in this Presidency. When a gift is made by a father to his sons the presumption of joint tenancy is stronger and it has been held to be so in a decision by a division Bench of this Court. *Janakiram Chetty* v. *Nagamony Mudaliar*[2]. For the above reasons I would hold that, in the absence of anything in the will which would lead me to infer Vijayaraghava's intention to be that the property should be enjoyed by his sons as tenants in common, it was enjoyed by them as joint tenants. Since one of the characteristics of joint tenancy is for the property to devolve by survivorship, Varada Pillai must be held to have, on his brother Thiruvengada's death, got the property by survivorship.

The second contention advanced by learned counsel for the appellant was that inasmuch as the original will was not produced on behalf of the respondents, it would be presumed to have been cancelled by Vijayaraghava.

[His Lordship dealt with the evidence and concluded:]

At all events there is nothing on the record to show that this will was cancelled by Vijayaraghava and in the absence of any such evidence on the record the finding must have been, as it was, against the first defendant.

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1. A.I.R. 1937 All. 197 (2).
2. (1925) I.L.R. 49 Mad. 98 at 105.

I would therefore hold that a decree should have been passed in favour of the plaintiffs even if the property was found to have been held, as I have now found it to be, by Varada Pillai as a joint tenant. The lower appellate Court has given an indication in its judgment of what the decree should have been in that event. Since I am not agreeing with the lower appellate Court's finding in regard to the tenancy being in common the alternative decree suggested by the lower appellate Court appears to be correct. Ramachandra Aiyar v. Ranganayaki Ammal.

The result is that the appeal is accepted to that extent and a decree is passed in favour of the plaintiffs in the terms suggested by the learned Subordinate Judge in the event of the property in Varada Pillai's hands being found to be ancestral although limited as a life estate. In view of the fact that the first defendant is succeeding to a large extent I would give him two thirds costs in this and in the lower appellate Court and one third costs in the trial Court.

(Leave to appeal is refused.)

S. V. V. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KING AND MR. JUSTICE PATANJALI SASTRI.

Arunachalam Pillai .. *Appellant* (Plaintiff)*

v.

Seetharam Naidu and others .. *Respondents (Defendants 1 to 12).*

Madras Agriculturists' Relief Act (IV of 1938), S. 19—Mortgage-debt scaled down in favour of agriculturist mortgagor—Effect on liability of the property in the hands of non-agriculturist court-auction purchaser in execution of a money decree against mortgagor—Relinquishment by mortgagee of right to personal decree against mortgagor—Effect on liability of the purchaser. Arunachalam Pillai v. Seetharam Naidu.

In a suit to enforce a mortgage against an agriculturist mortgagor and a non-agriculturist court-auction purchaser of the mortgaged property in execution of a money decree, the debt was sought to be scaled down on the application of the mortgagor. Thereupon the mortgagee sought to recover the full amount due on the mortgage from the non-agriculturist purchaser offering to relinquish his right to a personal decree against the mortgagor.

Held, that the properties are liable only as security for the debt due by the mortgagor and if as a result of the Act there is a statutory discharge or reduction of the debt, the properties cannot be proceeded against for

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* Appeal No. 47 of 1939. 23rd January, 1941.

Arunachalam Pillai *v.* Seetharam Naidu.

anything more than the scaled down amount of the debt. The purchaser in court-auction took the property subject to the burden of the mortgage and if the burden is by reason of the provisions of S. 8 of Act IV of 1938 reduced without payment, the purchase proves to that extent an advantageous one and there is nothing in the Act to deprive the purchaser of the fruits of his lucky purchase even though he is not an agriculturist. He gets the benefit of the scaling down not because the provisions of the Act apply to him, for obviously they do not, but because such benefit is a necessary incident of his purchase under the general law and the Act does not deprive him of it. The relinquishment by the mortgagee of his right to a personal decree against the mortgagor after Act IV of 1938 had come into force and the mortgagor had in fact applied for relief under it, cannot affect the position which arises under the Act with reference to a date long prior to such relinquishment.

Ramier v. *Srinivasiah*, (1940) 2 M.L.J 872: 52 L.W. 842, distinguished.

Perianna v. *Sellappa*, (1938) 2 M.L.J. 1068: I.L.R. 1939 Mad. 218 referred to.

Appeal against the decree of the Court of the Subordinate Judge of Madura dated the 31st August, 1938 in O. S. No. 73 of 1937.

K. V. Sesha Aiyangar and *R. Subramania Aiyar* for Appellant.

T. M. Krishnaswami Aiyar and *K. Venkatesvaran* for Respondents.

The judgment of the Court was delivered by

Patanjali Sastri, J.

Patanjali Sastri, J.—The question raised in this appeal is whether a mortgagee who sues to enforce his mortgage is entitled to a decree for the whole amount due under the mortgage against a non-agriculturist Court auction purchaser of the equity of redemption when the agriculturist mortgagor claims to have the debt scaled down under the provisions of the Madras Agriculturists' Relief Act. The appellant brought the suit out of which this appeal arises in August, 1937, for recovery of Rs. 8,500 by the sale of the mortgaged properties on foot of a mortgage executed by the managers of the joint family of respondents 1 to 8 (hereinafter referred to as the mortgagors) for Rs. 5,000 on 29th October, 1931. Respondents 9 to 11 are subsequent encumbrancers in respect of one of the properties comprised in the mortgage, and respondent 12 is the purchaser of all the properties subject to the mortgage in execution of a decree for money obtained by a third party against the mortgagors. While the suit was pending, the Madras Agriculturists'

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Relief Act came into force on 22nd March, 1938, and the mortgagors were allowed to file an additional written statement on 4th August, 1938, raising the plea that they were agriculturists as defined by the said Act and that the debt was liable to be scaled down in accordance with the provisions thereof. The appellant filed on 12th August, 1938, a reply statement whereby he relinquished his personal remedy against the mortgagors, confining the relief sought in the suit to a decree for sale of the properties in the hands of respondent 12. There is no dispute that all the respondents except respondent 12 are agriculturists within the meaning of the Act and that the amount due as scaled down under S. 8 is Rs. 3,050. The learned Subordinate Judge of Madura who tried the suit overruled the contention of the appellant that the debt should not be scaled down under the Act so far as the twelfth respondent was concerned and passed a preliminary decree for sale for the sum of Rs. 3,050 with interest thereon from 1st October, 1937, against all the respondents.

It is argued for the appellant that inasmuch as all the mortgaged properties are now in the hands of the twelfth respondent who is not an agriculturist and a decree is sought only against such properties, the Act has no application and a decree for sale for the full amount due under the mortgage ought to be passed against the twelfth respondent. In support of this contention, reliance is placed by learned counsel upon the decision reported in *Ramier* v. *Srinivasiah*[1], where it was accepted as a general proposition that the right of an agriculturist judgment-debtor to scale down a decree should not be allowed to enure for the benefit of a non-agriculturist judgment-debtor. That was a case where the mortgagor was not an agriculturist and the puisne mortgagee who claimed the benefit of the Act was an agriculturist and it was held, in view of an earlier decision, that the pusine mortgagee must be regarded as a debtor within the meaning of the Act and, being an agriculturist, was entitled to have the debt scaled down so far as his interest in the hypotheca was concerned, notwithstanding that it was payable in full by the non-agriculturist mortgagor. It is undoubtedly true that agriculturist debtors alone are entitled to the relief provided in the Act which does not contemplate any scaling down of debts due by others, but it does not follow that

2. (1940) 2 M.L.J. 872: 52 L.W. 842

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a non-agriculturist debtor can in no circumstances be benefited by the scaling down of a debt under the provisions of the Act. The properties now held by the twelfth respondent are liable only as security for the debt due by the mortgagors, and if as a result of the Act there is a statutory discharge or reduction of the debt, the properties cannot, it seems to us, be proceeded against for anything more than the scaled down amount of the debt. S. 8 of the Act so far as it is material here says:

"Debts incurred before the 1st October, 1932, shall be scaled down in the manner mentioned hereunder, namely

1. All interest outstanding on the 1st October, 1937, in favour of any creditor of an agriculturist whether the same be payable under law, custom or contract or under a decree of the Court and whether the debt or other obligation has ripened into a decree or not, shall be deemed to be discharged, and only the principal or such portion thereof as may be outstanding shall be deemed to be the amount repayable by the agriculturist on that date."

It cannot be denied that the appellant was on the material date, namely, the 1st October, 1937, a creditor of the mortgagors who are agriculturists in respect of a debt incurred before the 1st October, 1932, and the plain consequence of this provision is that all interest outstanding on that date is wiped out and the principal amount then outstanding is repayable. The appellant whose only right as a simple mortgagee is, 'in the event of his (mortgagor's) failing to pay according to his contract to cause the mortgaged property to be sold and the proceeds of sale to be applied, so far as may be necessary, in payment of the mortgage money' (*see* S. 58 (*b*) of the Transfer of Property Act), cannot claim to proceed against the properties in the hands of the 12th respondent for anything in excess of what is repayable under the mortgage. When the 12th respondent purchased the properties in court-auction, he took them subject to the burden of the appellant's mortgage and if the burden is by reason of the provisions of S. 8 referred to above reduced without payment, the purchase proves to that extent an advantageous one, and there is nothing in the Act to deprive him of the fruits of his lucky purchase, even though he is not an agriculturist. He gets the benefit of the scaling down not because the provisions of the Act apply to him for obviously they do not, but because such benefit is a necessary incident of his purchase under the general law and the Act does not deprive him of it. The appellant laid stress on his relinquishment of the claim for a personal decree against

the mortgagors and urged that it had the effect of converting the mortgage into a 'debt' payable solely by the 12th respondent as that expression has been understood in *Perianna* v. *Sellappa*[1]. It is, however, difficult to see how the appellant's relinquishment of his right to a personal decree against the mortgagors after the Act had come into force and the mortgagors had in fact applied for relief under it, can affect the position which arises under the Act with reference to a date long prior to such relinquishment. It is unnecessary to consider what the consequence would be if the appellant had agreed to exonerate the mortgagors from all personal liability before the Act came into force.

Arunachalam Pillai *v.* Seetharam Naidu.

Patanjali Sastri, J.

The appellant's learned counsel pointed out that according to the decisions in *Perianna* v. *Sellappa*[1] and *Ramier* v. *Srinivasiah*[2], a purchaser of property subject to a mortgage is entitled to the benefit of the Act if he is an agriculturist though the mortgagor is not, and submitted that it would be anomalous to hold that he gets the same benefit when he is not an agriculturist and the mortgagor is. We fail to see the anomaly. The Act entitles him to such benefit in the one case while, as already observed, it is the consequence of his purchase under the general law in the other.

The appeal is dismissed with costs of respondent 12.

K. S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE HORWILL.

Haji Abdul Kuthus Sahib (deceased) and others. *Appellants** (*Appellants and Nil*)

v.

Inayathulla Sahib and others .. *Respondents* (*Respondents*).

Provincial Insolvency Act (V of 1920), S. 44 (3)—Adjudication and later discharge of insolvent—One of the properties of insolvent transferred to his wife—Lawful transfer—Same property attached by a creditor before date of discharge—Whether after the date of discharge it could be proceeded against in the hands of the wife of the insolvent.

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The first appellant had no assets and, his creditors had taken no interest in the insolvency proceedings after adjudication order had

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1. (1938) 2 M.L.J. 1068: I.L.R. 1939 Mad. 218.
2. (1940) 2 M.L.J. 872: 52 L.W. 842.

* L. P. A. No. 16 of 1937. 8th November, 1940.

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been obtained. The result was that when he applied for discharge his application was unopposed. He was indebted to the estate of one *H*, who was represented in the present appeal, by the respondents. *H* had obtained a decree against the insolvent and attached a house belonging to him. As a matter of fact the house had been transferred to the insolvent's wife earlier to the date of both the adjudication as well as the later discharge, and the transfer had been upheld as a lawful transfer. The house having been attached by *H* but not sold till the date of the discharge mentioned, on the question whether the house remained liable to be seized and sold after the date of discharge,

Held, that the appellant had been released, by reason of the statute, from all liability to pay respondent's debt The creditors were not entitled to bring the house to sale, because the wife of the insolvent was under no personal obligation to pay the debt and she did not come within any of the categories mentioned in sub-S. (3) of S. 44 of the Provincial Insolvency Act. It is true that by reason of her earlier conduct she could not have prevented the property from being sold had a sale been held before the discharge but inasmuch as the debt became unenforceable by reason of the discharge, it followed that the right to proceed against the wife of the insolvent disappeared at the same time.

Appeal under Cl. 15 of the Letters Patent from the judgment of the Hon'ble Mr. Justice Venkataramana Rao dated 14th December, 1936 and passed in A.A.A.O. No. 84 of 1935 preferred against the order of the District Court, North Arcot dated 11th March, 1935, and made in Appeal No. 193 of 1934 (E. P. No. 1174 of 1933 in O. S. No. 46 of 1923, District Munsif's Court, Vellore).

N. Srinivasa Aiyangar and *R. Ramamoorthi Aiyar* for Appellants.

N. Sivaramakrishna Aiyar for Respondents.

The judgment of the Court was delivered by

Leach, C. J.

The Chief Justice.—This appeal raises the question of the effect of S. 44 of the Provincial Insolvency Act. The first appellant was adjudicated an insolvent by the District Munsif of Trivellore on the 26th March, 1927 on a petition which had been presented on the 2nd October, 1926. The appellant apparently had no assets and as so often happens his creditors took no interest in the proceedings after the adjudication order had been obtained. The result was that when he applied for his discharge his application was not opposed and it was granted on the 8th February, 1928. The first appellant was indebted to the estate of one Habibulla Sahib, who is now represented by the respondents in this appeal. Habibulla Sahib had obtained a decree against the first appellant and on the 21st February, 1923, he attached a house as property belonging to

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the first appellant. As a matter of fact this property was the property of the appellant's wife, Maimoona Bi Bi. It had belonged to the first appellant, but on the 12th February, 1923 he transferred it to his wife and it was held by this Court in other proceedings that the transfer was lawful. On the 24th July, 1927 Maimoona Bi Bi applied for the removal of the attachment on the ground that the property was hers, but her application was dismissed by the District Munsif of Vellore, who relegated her to a regular suit. She filed a suit, but on the date of the hearing she did not appear and it was dismissed with costs. Therefore, so far as the respondents' execution proceedings were concerned the house was liable to be seized and sold for the first appellant's debt and it undoubtedly remained liable until the 8th February, 1928 when the first appellant obtained his discharge. The question which the Court is called upon to consider in this appeal is whether the house remained liable to be seized and sold after that date. The District Munsif held that the respondents were entitled to have the house sold and his decision was concurred in by the District Judge of North Arcot on appeal. The appellant then appealed to this Court and Venkataramana Rao, J., who heard it, decided that the Courts below had correctly interpreted the law, but he gave a certificate permitting the filing of the present appeal under Cl. 15 of the Letters Patent.

S. 44 of the Provincial Insolvency Act reads as follows:

"(1) An order of discharge shall not release the insolvent from—

(a) any debt due to the Crown;

(b) any debt or liability incurred by means of any fraud or fraudulent breach of trust to which he was a party;

(c) any debt or liability in respect of which he has obtained forbearance by any fraud to which he was a party;

(d) any liability under an order for maintenance made under S. 488 of the Code of Criminal Procedure, 1898.

(2) Save as otherwise provided by sub-S. (1), an order of discharge shall release the insolvent from all debts provable under this Act.

(3) An order of discharge shall not release any person who, at the date of the presentation of the petition, was a partner or co-trustee with the insolvent, or was jointly bound or had made any joint contract with him or any person who was surety for him."

Therefore unless a debt is of the nature of any of those set out in sub-S. (1) an order of discharge absolves the insolvent from liability to pay all his debts which were provable under the Act, but an order of discharge does not by virtue of sub-

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S. (3) release third parties who are also liable. The section displays no ambiguity and by reason of it the debt which the first appellant owed to the respondents became unenforceable by them.

On the 8th February, 1928 the Court ordered the appellant's discharge and as was pointed out in *Thompson* v. *Cohen*[1] if the debt is gone the creditor's right to seize in respect of it is also gone. In upholding the decision of the District Judge, Venkataramana Rao, J., considered that because Maimoona Bi Bi had allowed her suit to be dismissed for default, her property was liable to be sold in execution for the first appellant's debt, notwithstanding the order of discharge. The learned Judge relied on the decision of Cornish, J., in *Duraiswamy Pillai* v. *Arumuga Naicker*[2]. In that case the appellant had attached before judgment property belonging to the respondent. The respondent nevertheless sold the property to a third person. Subsequently, the respondent was adjudicated an insolvent and the appellant proved his debt. As in the present case there were no assets, and in due course the respondent obtained his discharge. The appellant then sought to execute his decree against the property which he had attached. It was held that the effect of the sale to the third party, contrary to the provisions of S. 64 of the Code of Civil Procedure, was not to make the transfer absolutely void, and the property could be regarded as an asset of the debtor notwithstanding the transfer. The alienee had taken the property subject to the right of the appellant to sell it in execution. It is not necessary for us to consider whether that case was rightly decided, because the facts are not similar to the facts in the present case. It is not a matter of a transfer of property after attachment. The transfer to Maimoona Bi Bi took place before the decree and long before the insolvency. It was obviously because the property had been transferred to Maimoona Bi Bi that the Official Receiver in this case made no attempt to take possession.

The position then is this. The appellant, by reason of the statute had been released from all liability to pay the respondents' debt, but the respondents wish to enforce payment by the sale of the house belonging to Maimoona Bi Bi. In our opinion they are not entitled to do so, because Maimoona Bi Bi herself

1. (1872) 7 Q.B. 527. 2. 1935) 69 M.L.J. 799.

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was under no personal liability to pay the debt and she did not come within any of the categories mentioned in sub-S. (3) of S. 44 of the Provincial Insolvency Act. It is true that by her conduct she could not have prevented the property from being sold had a sale been held before the discharge, but inasmuch as the debt became unenforceable by reason of the discharge it follows that the right to proceed against Maimoona Bi Bi's house disappeared at the same time. If the debt were an existing and enforceable debt then the respondents could proceed with the attachment and bring the property to sale, but inasmuch as the debt has gone the respondents are not in a position to take proceedings in execution. S. 44 prevents them.

The result is that the appeal will be allowed with costs in this Court and before Venkataramana Rao, J., but each party will pay their own costs in the Court of the District Munsif and in the District Court.

K. C. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE KRISHNASWAMI AIYANGAR.

The Official Receiver, Nellore ... *Appellant** (*1st Respondent*)

v.

Nerella Venkiah and another .. *Respondents* (*Appellant and 2nd Respondent.*)

Official Receiver, Nellore *v.* Venkiah.

Civil Procedure Code (V of 1908), O. 21, r. 22—Scope and applicability—Insolvency of some judgment-debtors—Official Receiver—Right to object to sale.

On 9th August, 1929, an application was filed for the adjudication as insolvent of one *L* who was the father of five sons. *L* however died before the petition could be heard, but the petition was continued against his three major sons and an order for adjudication was passed against them on 24th November, 1930. On 16th November, 1934 a creditor filed a suit against all the sons for money owed by them on a promissory note which was a renewal of an earlier promissory note made by the father. The Official Receiver was not impleaded as a party though the creditor knew of the adjudication of the three elder sons. The suit was not defended and a decree was passed. The creditor instituted execution proceedings and attached certain immovable property belonging to the family. On 18th November, 1935 the property was sold by order of Court and purchased by a stranger. On 17th December, 1935 the two younger sons applied for setting aside the sale on the ground of material irregularity and fraud in the publication of the sale. The Official Receiver also filed a similar application and relied in addition on O. 21, r. 22, Civil Procedure Code under which he ought to have received notice of the

* L. P. A. No. 48 of 1939. 4th November, 1940.

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execution proceedings but had not. The applications were rejected whereupon the Official Receiver alone preferred an appeal.

Held, that in the circumstances the dispute was clearly one between the decree-holder and the Official Receiver as the representative of the insolvent judgment-debtors, that S. 47 of the Code of Civil Procedure applied and gave the Official Receiver the right of challenging the sale in execution as the representative of the three insolvent judgment-debtors and therefore he was entitled to have his petition granted to the extent of the interest of the insolvents, by reason of the non-observance of O. 21, r. 22 Civil Procedure Code.

Appeal under Cl. 15 of the Letters Patent against the judgment and order of the Hon'ble Mr. Justice Wadsworth dated the 16th August, 1939 and passed in A.A.A. O. No. 51 of 1937, preferred against the order of the District Court of Nellore, dated the 19th November, 1936 and made in C.M.A. No. 24 of 1936 preferred against the order of the Court of the District Munsif of Kavali in E.A. No. 1413 of 1935 in O. S. No. 350 of 1934.

M. S. Ramachandra Rao and *D. R. Krishna Rao* for Appellant.

Ch. Raghava Rao and *T. K. Sundararaman* for Respondents.

The judgment of the Court was delivered by

Leach, C.J.

The Chief Justice:—On the 9th August, 1929 an application was filed in the Court of the Subordinate Judge of Nellore for the adjudication in insolvency of one Lebakula Subba Reddi, the father of five sons. He died before the petition could be heard, but the petition was continued against his three elder sons and rightly or wrongly an order for adjudication was passed against them on the 24th November, 1930. On the 16th November, 1934 the second respondent in this appeal filed a suit against the five sons for the money owed by them on a promissory note, which was a renewal of an earlier promissory note made by the father. The second respondent did not implead the Official Receiver, although he knew of the adjudication of the three sons. The suit was not defended and in due course a decree was passed against the defendants, which resulted in the second respondent instituting execution proceedings, in the course of which he attached certain immovable property belonging to the family. On the 18th November, 1935 the property was sold by the order of the Court and purchased by the first respondent. On the 17th December, 1935 the two younger sons applied to the Court for an order setting aside the sale on the ground of material

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irregularity and fraud in the publication of the sale, and at the same time a similar application was filed by the Official Receiver, who is the appellant in this appeal. The appellant also relied on the provisions of O. 21, r. 22 of the Code of Civil Procedure by reason of which he ought to have received notice of the execution proceedings. It is common ground that no notice was served upon him. The District Munsif of Kavali, in whose Court the second respondent's suit had been decreed and the execution proceedings conducted, held that there were no grounds for setting aside the sale and accordingly dismissed the petition. The two younger sons did not question the District Munsif's decision, but the appellant did. He appealed to the District Judge of Nellore, who allowed the appeal. The District Judge considered that S. 47 of the Code of Civil Procedure applied and that it gave the appellant the right of challenging the sale as the representative of the three insolvent judgment-debtors. He set aside the sale on the ground that the insolvent judgment-debtors had no interest in the property, because it had devolved upon the appellant. The first respondent then appealed to this Court and his appeal was allowed by Wadsworth, J. The main reason given by the learned Judge for allowing the appeal was that the appellant was not the representative of the insolvent judgment-debtors, but of their creditors and therefore he was not within the provisions of S. 47 of the Code of Civil Procedure.

We are of the opinion that the learned Judge erred in allowing the appeal. O. 21, r. 22 makes it obligatory on a decree-holder to serve notice of an application for execution on the legal representative of a party to the decree, or where the party to the decree has been declared insolvent, on the Official Assignee or the Receiver in insolvency. A Full Bench of this Court held in *Rajagopala Aiyar* v. *Ramanujachariar*[1] that a sale which has been held without the service of the notice required by O. 21, r. 22 is void, and therefore if the appellant is to be regarded as a representative of a party to the decree he had the right to institute the petition which has given rise to this appeal and to have an order passed in his favour. It has been argued on behalf of the first respondent, the purchaser at the auction, that this is not a dispute between the representatives of the parties to the suit, but between the representatives of the

1. (1923) 46 M.L.J. 104: I.L.R. 47 Mad. 288, (F.B.).

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insolvent judgment-debtors, that is to say, a dispute between the representatives of one side. We cannot accept this contention. The appellant as the Official Receiver represents the insolvent judgment-debtors. Their interest in the property with which these proceedings are concerned devolved upon him. We disagree with the learned Judge that the appellant must be regarded merely as the representative of the creditors and we are of the opinion that the fact that the first respondent claims through the judgment-debtors does not make the dispute one between the representatives of the judgment-debtors. It is obviously a dispute between the second respondent as the decree-holder and the Official Receiver who represents the interests of the insolvent judgment-debtors. What the appellant has complained of, and is complaining of, is not what the first respondent has done. He has throughout complained of the fact that the second respondent has brought this property to sale without notice to him. Therefore the dispute is clearly between the decree-holder and the representative of the insolvent judgment-debtors which means that S. 47 has full application. The mere fact that the first respondent as the auction purchaser is affected by the proceeding will not make it any the less a dispute between one of the parties and the representative of the other parties to the suit. The appellant having the right of recourse to the Court by virtue of the provisions of S. 47 he is entitled to have his petition granted by reason of the non-observance of O. 21, r. 22.

The result is that the appeal will be allowed so far as the interest of the three insolvent judgment-debtors in the property is concerned. The District Judge set aside the sale with regard to the two non-insolvent judgment-debtors also, but here he erred.

As the appellant has succeeded he is entitled to his costs throughout.

A memorandum of cross-objections has been filed by the first respondent but it has not been pressed and it will be dismissed without costs.

K. S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE KRISHNASWAMI AIYANGAR.

Kuniyil Chandu .. *Appellant** (*Appellant*)

v.

Mathiledath Sankaran and another .. *Respondents* (*Respondents*).

Malabar Tenancy Act (XIV of 1930), S. 20—Scope—Eviction of tenant—Contract between parties before Act—Enforceability against tenant—Interpretation of Statutes.

Chandu *v.* Sankaran.

The language employed in S. 20 of the Malabar Tenancy Act is plain and peremptory and prohibits a suit for eviction being instituted except on one or more of the several grounds specified in the section. There are no words showing an intention on the part of the legislature to save contracts entered into before or after the Act. Consequently a contract between the landlord and the tenant entered into before the Act and conferring a right of eviction on grounds other than those enumerated in S 20 cannot be enforced by the landlord.

The primary rule by which Courts should be guided in the construction of a statute is to consider first the words employed and ascertain their ordinary grammatical meaning. It is only where the words are ambiguous that it is permissible to look at the scheme of the Act or the language used in other parts of the statute for gathering the intention.

Appeal under Cl. 15 of the Letters Patent against the judgment and decree of the Hon'ble Mr. Justice Patanjali Sastri, dated 30th August, 1939 and passed in S. A. No. 261 of of 1938 preferred to the High Court against the decree of the Court of the Subordinate Judge of South Malabar at Calicut in A. S. No. 67 of 1935 preferred against the decree of the Court of the District Munsif of Calicut in O. S. No. 176 of 1934.

P. Govinda Menon for Appellant.

Respondent not represented.

The judgment of the Court was delivered by

Krishnaswami Aiyangar, J.

Krishnaswami Aiyangar, J.—This appeal arises out of a suit instituted by the appellant who is the owner of a paramba in South Malabar to evict the respondents from it. The paramba had been demised on kanom to the first respondent on the 31st May, 1927. A kychit of even date was executed by him and evidences the terms of the contract. The demise was for a period of 12 years, but was terminable earlier at the option of the appellant, on the happening of one or other of certain

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* L. P. A, No. 35 of 1939. 22nd October, 1940.

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conditions mentioned in the kychit. Those conditions are found stated in it in the following words:

"If I keep the rent in arrears, or do any acts prejudicial to you or if you are in need of the plot or if I quarry stones from the plot without your written consent thereto, I shall on demand by you surrender the plot to you without raising any dispute whatever, or any plea as to the terms. . . . ."

On the 3rd August, 1931, the appellant served a notice on the respondents demanding surrender of the paramba on the ground that the first respondent had allowed the rent to fall into arrears and had also without his consent quarried stones from the demised paramba in direct violation of the terms of the kychit. The first respondent answered by a reply notice dated the 14th August, 1931, in which he denied that he had quarried stones from the paramba as alleged by the appellant but admitted that the rents had not been duly paid. He however promised to pay the arrears in three monthly instalments, and added that if the appellant wanted the paramba he was willing to surrender it after the monsoons, that is, at the end of six months, on payment to him of the kanom amount, and the value of the improvements effected by him. On the 21st February, 1934, the appellant instituted the suit out of which this appeal has arisen for recovery of the paramba on two grounds, namely: (1) that the first respondent, the kanomdar had failed to pay the rents in due time, and (2) that he had quarried stones from the demised paramba without the appellant's consent. The second respondent, the mother of the first, was added as a party defendant on the ground that she was also residing on the paramba with the first respondent. The District Munsif who tried the suit found for the appellant on both points and accordingly granted a decree in his favour. The first respondent appealed to the Subordinate Judge of Calicut who reversed the decree of the District Munsif and dismissed the suit. He held that the first respondent had before suit made a tender of the arrears of rent sufficient in amount to negative the first ground put forward by appellant. As regards the second ground, he concurred with the District Munsif in holding that the first respondent had in fact quarried stones from the paramba without the consent of the appellant, but held that even this ground, good and valid though it might have been before the Malabar Tenancy Act, 1930 came into force, has since become inoperative as a result of the provisions contained in S. 20 of that Act. In the view

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which the Subordinate Judge took, there was no cause of action for the suit, and he therefore felt bound to reverse the decree of the District Munsif and dismiss the suit. Against this decision a second appeal was preferred to this Court. Patanjali Sastri, J., who heard it, concurred in the decision of the Subordinate Judge and the result was that this second appeal was also dismissed. The learned Judge, however, granted leave for an appeal being preferred under Cl. 15 of the Letters Patent, and this appeal has accordingly been filed.

On a consideration of the relevant provisions of the Act, Patanjali, Sastri, J., has accepted the view of the Subordinate Judge that a landlord in Malabar cannot maintain a suit for the eviction of a kanomdar except on one or more of the several grounds enumerated in S. 20 of the Act. In his opinion a contract between the parties which confers a right of eviction on grounds other than those enumerated in the section, has been rendered ineffectual as the Legislature intended that all stipulations between the parties whether made before or after the Act, should be superseded if they run counter to the provisions contained in the section. In other words, a contract between the parties cannot avail the landlord if he cannot bring himself within the section.

Section 20 of the Malabar Tenancy Act, 1930 reads as follows:

"No suit for eviction of a customary verumpattamdar, kuzhikanomdar or kanomdar shall lie at the instance of his landholder except on the following grounds."

Six grounds are enumerated in the section of which it is only necessary to refer to one, namely, that mentioned in Cl. (2), which confers a right of eviction if the tenant had intentionally and wilfully committed such acts of waste as would impair materially and permanently the value or utility of the holding for agricultural purposes. In the present case the Subordinate Judge has found as a fact—and this finding is binding on us that though the respondent did quarry stones from the paramba, his action was not such an act of waste as can be said to have materially or permanently impaired the value of the holding for agricultural purposes. That being so, the act complained of cannot be held to attack the provisions of the clause referred to, and furnish a ground of eviction. In fact the appellant concedes this position but only argues that his rights such as they were under the kychits should not be held to have been preju-

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dicially affected by anything contained in an enactment of a later date, in the absence of express words to the contrary.

We are clearly of opinion that this contention cannot be supported. The language employed in S. 20 is plain and peremptory and prohibits a suit for eviction being instituted except on one or more of the several grounds specified in the section. There are no words showing an intention on the part of the Legislature to save contracts entered into before or after the Act. On behalf of the appellant our attention was called to the difference between the wording of S. 20, and that of Ss. 10, 22 and 32 of the Act in which the following words, "notwithstanding any contract to the contrary" occur at the commencement. The point sought to be made was that the omission of these words in S. 20, shows that it was not the intention of the Legislature to abrogate the contract of parties. It was argued that whenever the Legislature intended that the terms of such a contract should be nullified it has taken care to use apt language to express such an intention; whereas in S. 20, the section with which we are now concerned, such words are conspicuous by their absence. It is to be observed that the primary rule by which we should be guided in the construction of a statute is to consider first the words employed and ascertain their ordinary grammatical meaning. It is only where the words are ambiguous it is permissible to look at the scheme of the Act or the language used in other parts of the statute for gathering the intention. We are unable to see any ambiguity in the words of S. 20 and it is therefore unnecessary to compare and consider the meaning of the language employed in other parts of the statute. Its effect in our judgment is to supersede and nullify all contracts which recognise a right of eviction in the landowner contrary to the terms of the section. Learned counsel for the appellant relied in support of his argument on a decision of a Bench of this Court in *Mura Kasim Rowther* v. *G. F. F. Foulkes*[1], which turned on the language of Ss. 9, 151 and 187 of the Madras Estates Land Act, 1908. That was a case where a landholder sued to evict a ryot on the ground that the ryot had used the land in a manner calculated to impair its value for agricultural purposes. It was found that there was a contract, or what amounted to it, between the parties which permitted the tenant to use the land in the way in which he did,

1. (1912) 23 M.L.J. 352.

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though the result of such user was to produce the consequences mentioned. It was held that such a term conferring as it did, a benefit upon the tenant was not affected by anything contained in S. 151 or S. 187. The principle underlying this decision can have no application to a case such as the present. One of the objects, perhaps the main object of this Act, as it is of the Malabar Tenancy Act, was to secure a fixity of tenure for tenants, and to protect them against arbitrary evictions by the superior proprietor. Freedom of contract was interfered with not for the benefit of the landholder, but for the benefit of the tenant, because it was the tenant who was not in a position to contract on equal terms with the proprietor, and it was he who required protection and not the proprietor. The learned Judges who decided *Mura Kasim Rowther* v. *G. F. F. Foulkes*[1], were therefore, warranted in holding, as they did, that Ss. 151 and 187 of the Madras Estates Land Act did not operate to the prejudice of rights conferred on a tenant by the landholder by a contract entered into between them. We do not see how this decision can help the appellant. We are not in this case concerned with a contract containing a term intending to operate for the benefit of the tenant as in the case quoted, but with one conferring privilege on the owner of the land.

We are of opinion that the decision of the learned Judge who decided the second appeal is right. The appeal is accordingly dismissed with costs of the first respondent.

B. V. V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE HAPPELL.

C. D. Parthasarathy ... *Appellant** (*Claimant*).

v.

The Madras Publishing House Ltd. through its liquidator T. T. Vijayaraghavan and others ... *Respondents* (*Official Liquidator, Petitioner & Mortgagee*).

Parthasarathy v. Madras Publishing House Ltd.

1. (1912) 23 M.L.J. 352.

* O. S. A. No. 59 of 1940. 10th February, 1941.

Partha-sarathy v. Madras Publishing House Ltd.

Companies Act (VII of 1913), S. 230 (1) (b) and (2) (b) —Liquidation—Preferential claim for salary of employee—Floating charge over book debts of company—Priority over.

On the winding-up of a company, an employee is by virtue of S. 230 (1) (*b*) and (2) (*b*) of the Companies Act entitled, in respect of arrears of salary to the extent of Rs. 1,000, to priority of payment as against the holder of a floating charge created by a debenture over the book debts of the company, from the proceeds of such book debts.

In re *Lewis Merthyr Consolidated Collieries, Ltd. Lloyds Bank Ltd.* v. *The Company,* (1929) 1 Ch. 498, followed.

Appeal from the order of the Hon'ble Mr. Justice Gentle dated the 25th July, 1940 and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in Application No. 241 of 1940 in O. P. No. 328 of 1939.

P. S. Narayanaswami Aiyar for Appellant.

T.T. Vijayaraghavan, S.V. Shenoy and *C. R. Rajagopalachariar* for Respondents.

The judgment of the Court was delivered by

Leach, C.J.

The Chief Justice.—This appeal raises a question of priority in the distribution of the assets of the Madras Publishing House Ltd., which by an order of this Court went into compulsory liquidation on the 12th January, 1940. The assets of the company were mortgaged or charged to the third respondent under a registered deed dated the 31st August, 1937. By that deed all the immoveable properties, the machinery, plant, stock-in-trade, fixtures, fittings and other chattels were mortgaged to the third respondent and he was given a floating charge over the book debts of the company. The properties which were subject to the mortgage were described in separate paragraphs and there was a separate paragraph with reference to the floating charge over the book debts. The properties which were subject to the mortgage were by an order of the Court sold to the mortgagee for Rs. 1,89,000 which amount was set off against the mortgage-debt. At a later stage the book debts of the undertaking were sold to him for Rs. 20,994 and this was also set off against the mortgage-debt. The appellant says that by virtue of S. 230 of the Indian Companies Act the Court had no power to sell the book debts to the mortgagee without providing for the priorities provided for in that section. The appellant was the Secretary of the company and he says that at the date of the liquidation there was due to him by way of salary a sum of Rs. 2,400.

Parthasarathy v. Madras Publishing House Ltd.

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S. 230 (1) (*b*) says that in a winding-up there shall be paid in priority to all other debts, the wages or salary of any clerk or servant in respect of service rendered to the company within the two months next before the date of the winding-up, not exceeding one thousand rupees for each clerk or servant. Sub-S. 2 (*b*) provides that the debts in respect of which priority is given by sub-S. (1) shall so far as the assets of the company available for the payment of general creditors are insufficient to meet them, have priority over the claims of holders of debentures under any floating charge created by the company, and be paid accordingly out of any property comprised in or subject to the charge. In other words, a person or a company entitled to a floating charge created by a debenture is postponed to a clerk or servant to the extent stated in sub-S. (1).

The appellant's case is that as the third respondent has only a floating charge over the book debts he is entitled to have the book debts realised and out of the proceeds to be paid Rs. 1,000 before the third respondent receives anything from this source. This was not the claim advanced before Gentle, J., who heard the appellant's petition. Before the learned Judge the appellant boldly asserted that he was entitled by virtue of S. 230 to priority over the third respondent in respect of all assets of the company, including those assets which are admittedly subject to the registered mortgage. The learned Judge rightly rejected this contention, but he did not consider whether the appellant's case with regard to the book debts stood on a different basis. He did not consider this question as it was not raised before him. It has been raised in the memorandum of appeal and the Court must consider it.

S. 230 makes it quite clear that where there is a floating charge created by a debenture the debenture-holder does not get priority over the debts contemplated in sub-S. (1). In the past there has been a great deal of discussion as to what the word 'debenture' implies, but it is not necessary to decide on a definition here because it is accepted by all parties to this appeal that the deed created by the company in favour of the third respondent is a debenture within the meaning of the section. In In re *Lewis Merthyr Consolidated Collieries, Ltd. Lloyds Bank Ltd.* v. *The Company*[1], the Court of Appeal had to consider the effect of a

1. (1929) 1 Ch. 498.

debenture which created a fixed first charge on certain assets of the company and a floating charge on other assets. It was held that the priority given by S. 107 of the Companies (Consolidation) Act, 1908, is, in such a case, given in respect of assets subject to the floating charge but not in respect of assets which are subject to the fixed charge. The fixed charge and the floating charge are separable. In the present case, we have certain fixed charges and we have a floating charge in respect of the book debts of the company and as that charge was still a floating charge at the date of the winding-up the provisions of S. 230 apply. In these circumstances the Court had no power to sell the debts to the third respondent, ignoring the provisions of S. 230.

The appellant's claim is not admitted and therefore the question whether he is entitled to rank as a creditor for Rs. 2,400 or for any part of that sum remains to be decided. In view of our decision the case will be remanded to the Original Side for the determination of this question. If the appellant succeeds in establishing his claim he will be entitled to be paid out of the proceeds of the book debts to the extent of Rs. 1,000, and any lesser sum proved will stand on the same basis. If necessary, there will be a re-sale of those assets. The question how the appellant's claim should be satisfied, supposing he establishes it, will be left to the Original Side to be decided in the light of this judgment. The appellant's rights, whatever they may be, will, of course, be subject to the rights of the liquidator under sub-S. (3) of S. 230.

The appellant has succeeded but we do not think that he is entitled to an order for costs. If he had raised before Gentle, J., the question which he has raised now, this appeal would have been avoided. The costs allowed in the Court below will stand.

K. S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KING.

Subbiah Ambalam Servai ... *Petitioner* (Plaintiff).*

v.

Unnamalai Achi and others ... *Respondents (Defendants 1 to 3).*

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* C. R. P. No. 55 of 1939. 17th January, 1941.

Subbiah Ambalam Servai
v.
Unnamalai Achi.

Limitation Act (*IX of* 1908), *S.* 22—*Suit against estate of deceased, represented by his widow—Suit filed on the last date of limitation—Subsequent knowledge of the existence of executors under a will of the deceased—Executors later impleaded as parties—Suit whether barred, in the circumstances.*

In a suit by the plaintiff to recover a certain amount filed on the last day of limitation against the estate of the deceased represented by his widow, it was found later that a will had been left by the holder of the estate in which two persons were appointed as executors. The plaintiff therefore made them second and third defendants to the suit afterwards. On the question whether the suit was barred by limitation by reason of S. 22 of the Limitation Act,

Held, that S. 22 of the Act did not apply to the present case and that the suit was brought within time.

If a suit had been *bona fide* brought by the plaintiff against the person whom he reasonably thought to be the legal representative, the estate was sufficiently represented by the person; therefore, if at one time in the same suit one defendant who was not the real representative was impleaded, and at another time the rightful legal representatives, the executors in this case, were also impleaded, the same estate had been represented throughout the suit. The fact that the rightful legal representatives were actually impleaded after the time for limitation was over would not, in the circumstances, bar the suit.

Sanna Govappa v. *Rodda Sanna Govappa*, (1928) 30 L.W. 778: and *Chathurbujadoss Kushaldoss and Sons* v. *Rajamanicka Mudaliar*, (1930) 60 M.L.J. 97 followed.

Northern Bank v. *Ramachander*, A.I.R. 1932 Lah. 314 distinguished.

Petition under S. 25 of Act IX of 1887 praying that the High Court will be pleased to revise the decree of the Court of the District Munsif of Devakottai dated the 29th July, 1938 and passed in S. C. S. No. 744 of 1937.

S. Venkatesa Aiyangar for Petitioner.

V. Ramaswami Aiyar and *V. Seshadri* for Respondents.

The Court delivered the following

JUDGMENT.—The petitioner in this case sued in the Court of the District Munsif of Devakottai to recover a sum of Rs. 150 which was entrusted by him at Penang on the 24th November, 1934 with one Mariappan, the agent of Ramaswami Chettiar, for the purpose of remitting that money to British India. The suit was filed on the 24th November, 1937 on the last day permitted by limitation on the assumption that the limitation began to run from the date of the entrustment. Ramaswami Chettiar was then dead and his widow was impleaded as defendant and a decree was sought for against the assets of Ramaswami Chettiar in her hands. While the suit was pending, it was brought to the notice of the plaintiff that

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Ramaswami Chettiar had left a will executed on the 17th of September, 1936 in which two persons were appointed as executors of his estate. Thereupon an application was made by the plaintiff to implead these executors as defendants 2 and 3 and on the 6th July, 1938 they were duly impleaded.

The only point which requires decision in this petition is whether the claim of the plaintiff is barred by limitation as against defendants 2 and 3. The learned District Munsif has held that the suit is barred by limitation and in so holding he relies upon the language of S. 22 of the Limitation Act which runs as follows:

> "Where after the institution of a suit, a new plaintiff or defendant is substituted or added, the suit shall, as regards him, be deemed to have been instituted when he was so made a party."

The question, therefore, for me to decide is whether S. 22 has been rightly applied by the learned District Munsif to the facts of this case. Clearly if the second and third defendants are new defendants within the meaning of S. 22, the suit was barred on the date when they were ordered to be impleaded. But it is argued for the petitioner that they are not really new defendants, but merely new representatives of the same estate which was already represented by the impleading of the first defendant at the time when there was no bar of limitation. It seems to me that this argument must prevail. It is quite clear that the plaintiff in the present suit was not suing either the first defendant or the second and third defendants in their personal capacity. Although it is true that the estate of a deceased person must be represented in any suit by some living person, the real defendant in this suit may rightly be said to be the estate of Ramaswami Chettiar. It was Ramaswami Chettiar who was plaintiff's debtor and plaintiff seeks to recover the amount of the debt from whosoever may represent Ramaswami Chettiar's estate. It seems to me reasonable therefore, on general principles to argue that as the first defendant and defendants 2 and 3 were all impleaded as representing Ramaswami Chettiar's estate, there is in essence the same defendant throughout.

It is, however, argued for the respondents here that if a wrong legal representative is impleaded, the estate against which the suit is laid cannot be said to be properly represented and therefore is not represented at all. On the facts of the

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present case, it would follow that the estate of Ramaswami Chettiar was never represented until defendants 2 and 3 were added. Therefore, the estate of Ramaswami Chettiar was sued against for the first time on a date when the suit was barred by limitation. This argument cannot be upheld in the face of two decisions of Benches of this Court, *Sanna Govappa* v. *Rodda Sanna Govappa*[1] and *Chathurbujadoss Kushaldoss & Sons* v. *Rajamanicka Mudaliar*[2]. These decisions are directly in point, although in one sense they do not deal with exactly the same question. They are cases in which a decree had already been granted against the estate of a deceased person represented by a legal representative who turned out after the decree not to have been the rightful legal representative of the deceased. It was held in both these cases that if the suit had been *bona fide* brought by the plaintiff against the person whom he reasonably thought to be the real legal representative, the estate was sufficiently represented by that person, and the decree, in the absence of anything to suggest fraud or collusion, was binding upon the true legal representative. It follows on an analysis of those cases that whoever may be impleaded as the representative of an estate—if impleaded *bona fide*—the estate is represented. Therefore, if at one time in the same suit one defendant who is not the real representative is impleaded, and at another time the rightful legal representatives are also impleaded the same estate has been represented throughout the suit. It is true that there are two cases cited before me, which hold that in circumstances similar to those with which I am now concerned, a suit would be barred by limitation. One of these is *Kavasji Sorabji* v. *Barjorji Sorabji*[3], a decision given so long ago as 1873. This decision deals with S. 14 of the Limitation Act then in force and not with S. 22. There is also a decision reported in *Northern Bank* v. *Ramachander*[4]. But it is significant that the learned Judges in that case gave as their final and clinching reason for their decision that a decree passed without the addition of the true legal representative to the estate of a defendant could in no manner have been binding upon that legal representative. That is directly contrary to the decisions of this Court in *Sanna Govappa* v. *Rodda Sanna Govappa*[1] and *Chathurbujadoss Kushaldoss & Sons* v. *Rajamanicka Mudaliar*[2]

1. (1928) 30 L.W. 778.
2. (1930) 60 M.L.J. 97.
3. (1873) 10 Bom. H.C.R. 224.
4. A.I.R. 1932 Lah. 314.

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to which I have already referred. I cannot therefore be asked in disposing of this petition to follow this ruling of the Lahore High Court, and with great respect I see no reason why I should follow the decision of the Bombay High Court which does not apparently seem to have been followed during the long interval which has elapsed since 1873.

I have also been referred by the learned advocate for the respondents to two Madras cases., *Seerangathuni* v. *Bava Vaithilinga Mudaliar*[1] and *Venktasubbamma* v. *Pulipulla Reddy*[2] in which S. 22 has been applied. In *Seerangathuni* v. *Bava Vaithilinga Mudaliar*[1] plaintiff who was one of the executors under a will brought a suit on behalf of the estate of the deceased testator. He did not join with him the other executor nor did he implead him as a defendant. Finally the co-executor was impleaded as a defendant on a date on which the suit would have been barred by limitation. It was held in *Seerangathuni* v. *Bava Vaithilinga Mudaliar*[1], that as the sixth defendant had not been impleaded within time, the suit must be barred. In *Venkatasubbamma* v. *Pulipulla Reddy*[2], a suit was filed by the daughter of a deceased person claiming as heir to him. On an inspection of the will of the deceased, it was discovered that another person was appointed executor and therefore the executor alone was competent to file the suit. The executor was then added as an additional plaintiff but at the time when the executor was added, the suit was barred by limitation. It was held that S. 22 applied to this case and plaintiff's suit was barred. It seems to me that these rulings have nothing to do with the particular problem before me. They are both cases—as will be seen—of plaintiffs who have filed suits which they were incompetent to file. It cannot be denied that when a plaintiff, claiming to be the representative of a deceased person, files a suit, he is filing it as an individual and that anybody else who is joined in the suit later must be a separate individual from him. Clearly therefore S. 22 applied and a second plaintiff or any person who ought to be a plaintiff or impleaded as a formal defendant is a *new* plaintiff or a *new* defendant within the meaning of that section. There is no case here of an estate as such suing for any benefit. Where, however, a plaintiff, as in this case, is suing to recover money on

1. (1921) 40 M.L.J. 532.
2. A.I.R. 1925 Mad. 917.

the allegation that the money was a debt due to him by a deceased person, and that it should be paid by the legal representative of that deceased person if his estate has come into his hands, he is in essence suing not the representative as an individual but the estate. As already mentioned, an analysis of the principles upon which *Sanna Govappa* v. *Rodda Sanna Govappa*[1] and *Chathurbujadoss Kushaldoss & Sons* v. *Rajamanicka Mudaliar*[2], were decided makes it clear to my mind that where in the same suit first one legal representative and then another is impleaded, the estate which is the object of the suit has been represented throughout and there is no change of defendants in the real sense of the word.

I hold accordingly that S. 22 does not apply to the present case and that the suit was brought within time. The decree of

ERRATA

(1941) 1 M. L. J. Reports P. 573.

For "Respondent not represented" *substitute* "S. R. Subramanian for first Respondent."

of Ramaswami

to the contrary and it seems to me extremely probable that any contention of this kind contesting the honesty of the plaintiff must necessarily have been raised during the proceedings for the adding of defendants 2 and 3 to the suit. The affidavits filed in connection with those proceedings are not available before me at the present time. But it seems to me reasonable to argue that if the Court had any reason to suspect that the plaintiff had known of the existence of defendants 2 and 3 as the executors of Ramaswami Chettiar at the time when he filed his suit, it would never have permitted these defendants to be impleaded at all. I am not prepared in these circumstances to accept the contention of the learned advocate for the respondents that the suit should be remanded to the District Munsif for a further finding on the point of limitation to depend upon the finding whether the action of the plaintiff in filing the plaint only against the first defendant was or was not *bona fide*. I am convinced, as I say, that it must have been *bona fide* in this sense. All other defences to the suit have been duly considered and found against the defendants by the learned District Munsif.

1. (1928) 30 L.W. 778. 2. (1930) 60 M.L.J. 97.

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It follows therefore that in allowing this petition, a decree must be granted to the plaintiff with costs throughout against defendants 2 and 3 payable out of the estate of Rawaswami Chettiar with interest at six per cent. per annum from the date of plaint to the date of realisation.

K. C. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KING AND MR. JUSTICE PATANJALI SASTRI.

R. M. G. Subramania Aiyar ... *Appellant** (*Plaintiff*)

v.

Ulagalumperumal Sethurayar and others ... *Respondents* (*Defendants and Nil.*)

Subramania Aiyar v. Ulagalumperumal Sethurayar.

Receiver in management during the pendency of succession suit relating to an impartible estate—Receiver borrowing money on promissory note for paying peishkush—*Suit on pronote—Whether creditor can get decree against estate.*

Where a receiver in management of an impartible Zamindari during the pendency of a succession suit relating thereto borrowed money on a promissory note for paying *peishkush* due to Government in respect of the estate and in a suit on the note, the creditor sought to obtain a decree not merely against the maker personally but also against the estate,

Held: that (1) A decree can be given against the estate only to the extent of any indemnity which the receiver may have against it, no charge having been created in favour of the creditor at the time of the borrowing.

(2) The principle of the Full Bench decision in 42 Mad. 185 by which the estate of a minor could be bound by a debt incurred by his guardian could not be extended to the case of a debt incurred by a receiver appointed by a Court, merely because the estate belonged to a Hindu and the debt was incurred for the benefit of the estate.

(3) The estate cannot be bound on the principles of justice and equity that one who has enjoyed a benefit should also be bound by the obligation created by the arrangement under which such benefit was derived.

Mohari Bibi v. *Shyama Bibi*, (1903) I.L.R. 30 Cal. 937 dissented from.

(4) The creditor will not be entitled to be subrogated to the first charge available to Government in respect of *peishkush*.

Chengalvaroya Reddi v. *Udai Kavour*, A.I.R. 1936 Mad. 752 explained.

Appeal against the decree of the Court of the Subordinate Judge of Tinnevelly in O. S. No. 33 of 1933.

T. M. Krishnaswami Aiyar and *P. N. Appuswami Aiyar* for Appellant.

S. Venkataraman, A. Swaminatha Aiyar and *N. Rajagopala Aiyangar* for Respondents.

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* Appeal No. 243 of 1934. 20th December, 1940.

Subramania Aiyar v. Ulagalumperumal Sethurayar.

Patanjali Sastri, J.

The judgment of the Court was delivered by

Patanjali Sastri, J.—The only question for determination in this appeal is whether the appellant is entitled to a decree against the estate of Urkad to which the 3rd respondent has been held entitled to succeed.

The appellant advanced a loan of Rs. 5,000 to the first respondent who executed a promissory note (Ex. A) for the amount. The sum was borrowed for the purpose of paying the *peishkush* which fell due in respect of the Zamindari when it was under the management of the first respondent as receiver appointed by the Court during the pendency of a succession suit relating to the Zamindari. That suit (O. S. No. 93 of 1929 in the lower court) was instituted by the 3rd respondent as the widow of the late Zamindar for recovery of the estate from the first respondent who had taken possession thereof asserting title thereto as the step-brother of the deceased. The suit ended in a decree in favour of the third respondent and the first respondent preferred an appeal to this Court. During the pendency of the appeal the second respondent was appointed as receiver to manage the estate and he continued in such management until the third respondent having finally succeeded in the litigation took possession of the Zamindari. The appellant brought the suit out of which this appeal arises for recovery of the amount of principal and interest due under the promissory note from the first respondent personally and from the assets of the estate in the hands of the 2nd respondent who was the receiver at the time. The latter having since been discharged from the receivership and the widow having taken possession of the Zamindari as the successful claimant as aforesaid she was brought on record as the 3rd respondent in this appeal and a decree is now sought against the estate in her hands. The Court below passed a decree against the first respondent personally and against the assets of the estate to the extent to which he (the first respondent) has a right of indemnity as receiver against that estate. Not satisfied with a decree in this form, the appellant has brought this appeal claiming payment out of the estate irrespective of the first respondent's indemnity and the question is whether the claim is sustainable.

The promissory note which has been marked as Ex. A is in the following terms:—

"Promissory note executed on the 3rd June, 1930, corresponding to the

Subbramania Aiyar v. Ulagalum-perumal Sethurayar.

Patanjali Sastri, J.

21st Vaikasi of 1105 Andu in favour of R.M.K. Subramaniya Aiyar Avergal, son of R. M. Ganapathi Aiyar Avergal, who is keeping hundiyal shop at Tinnevelly Bridge Railway Station, Tinnevelly Taluk, by the son of Zamindar Avergal, Kotilinga Sethu Rayar, and the Zamindar of Oorkadu and the present receiver of the said Zamin. *viz.*, U. K. Ulagalum Perumal Sethu Rayar Avergal, Kshatrapathi Avergal, residing in Oorkadu Cusba, Oorkadu Zamin, Ambasamudram Taluk, is as follows :—

For payment of Zamin *peishkush* urgently due to the Government, the sum borrowed on this date in cash from you, is Rs 5,000. I shall on demand pay you or order in cash the same together with interest thereon at 1 per cent. per mensem, and get back this note.

U. K. C. SETHU RAYAR,
Kshatrapathy,
3—6—1930."

Now, the 1st respondent has preferred no appeal challenging the personal decree passed against him by the Court below and the question whether the terms of the instrument are such as to exclude his personal liability does not arise and was not argued before us. Mr. T. M. Krishnaswami Aiyar's contention on behalf of the appellant was that in addition to the personal liability of the 1st respondent, the assets of the estate of which he was the receiver at the time of the borrowing, into whosoever hands they might have passed on the termination of the litigation, were liable for the amount due on the note as the debt was one properly incurred by the receiver in the course of his management, for a necessary purpose, namely, the payment of the *peishkush* due to the Government on the Zamindari. Mr. Krishnaswami Aiyar based the appellant's right to such relief on three grounds. First, he argued that the principle of the Full Bench decision in *Ramajogayya* v. *Jagannadham*[1] which has been followed in later decisions such as *Annamalai* v. *Muthuswamy*[2], should be applied to the facts of the present case. That was a case where a guardian of a Hindu minor entered into a contract for a necessary purpose such as, under the Hindu Law would support an alienation of the minor's estate, and a Full Bench of this Court while recognizing that a guardian cannot bind his ward by a personal covenant to pay held that under the personal law applicable to the minor, namely, the Hindu Law, a decree could be passed against the minor's estate in the hands of the guardian. It is difficult to see how this principle can be invoked in the case of a debt incurred by a receiver appointed by a Court although such debt was incurred

1. (1918) 36 M.L.J. 29: I.L.R. 42 Mad. 185 (F.B.)
2. (1939) 1 M.L.J. 992: I.L.R. 1939 Mad. 891.

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Patanjali Sastri, J.

for the benefit of the estate in his management and such estate belongs to a Hindu. It was suggested that the principle of *Hanumanpersad's case*[1], on which the Full Bench decision was based having been applied to cases of debts incurred by widows, managers of temple, Matathipathies and such other limited proprietors, might appropriately be extended to a case like the present of a debt incurred by a Court receiver in management. We are unable to appreciate this argument. What was held in *Hanumanpersad's case*[1], was that a guardian of a Hindu minor has the power to raise money by mortgaging or selling the estate of the minor for purposes which the Hindu Law recognises as necessary or beneficial for the minor, and the same test has been applied in judging the binding character of alienations effected by limited owners like a Hindu widow, Matathipathies etc. It is difficult to see how these decisions lend any support to the argument that a creditor who lends moneys to a Court receiver. without a charge on the estate in his hands is entitled, nevertheless, to a decree against such estate to whomsoever it may ultimately be adjudged to belong. Even in the case before the Full Bench, we may observe that considerable difficulty was felt in discovering the true legal basis on which a decree against a minor's estate could be passed on his guardian's covenant to pay. Wallis, C.J., inclined to the view that no basis for such a decree existed apart from the guardian's right of indemnity against the estate which could in an appropriate case be made available to a creditor. The majority (Ayling and Seshagiri Aiyar, JJ.), however, were of opinion that such a basis could be found in the Hindu Law which was the personal law applicable to the minor in that case. The case bears no analogy to the present and we are wholly unable to appreciate the argument that the principle is applicable to a loan contracted by a receiver merely because the estate for the benefit of which it was borrowed belongs to a Hindu.

Mr. Krishnaswami Aiyar then broadly contended that a loan contracted by a receiver for purposes sanctioned by the Court whether before or after the borrowing is binding on the estate which has been benefited by it, and on the principles of justice, equity and good conscience, the creditor should be given a decree against the estate into whosoever hands it may ulti-

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1. (1856) 6 M.I.A. 393.

Subramania Aiyar v. Ulagalumperumal Sethurayar.

Patanjali Sastri J.

mately have passed. Reliance was placed upon the decision of Sale, J., in *Mohari Bibi* v. *Shyama Bibi*[1], which no doubt supports the contention. The learned Judge observed—

"I do not think that it is necessary to resort to the doctrine of the creditor's right to the benefit of the receiver's indemnity as a foundation for the right to sue the estate for a debt incurred by the receiver. A right to maintain such a suit is, in my opinion, founded on the just and equitable principle that as the acts of a receiver so long as they fall within his authority are the acts of the Court, the estate cannot be permitted to enjoy the benefit of those acts without being held responsible for the obligations arising out of them."

No authority is quoted in support of this broad proposition but the learned Judge refers to an observation of Rigby, L.J., in *Burt, Boulton and Hayward* v. *Bull*[2]:

"The Court could never have intended by its action to bring about such a state of things as that a business might be carried on perhaps for years and then, owing to failure of the assets, all the creditors should go without payment."

With all respect, we are unable to see how this observation supports in any way the proposition enunciated by the learned Judge. The observation was intended, as a reference to the context clearly shows, to support the inference that in such circumstances the receiver intended to pledge and the creditors to trust the receiver's personal credit. For, the learned Judge (Rigby L.J.,) said:

"....the intention is that the receiver and manager so appointed should appear to the world as the person carrying on the business in the usual way, making himself personally liable on all contracts, except in cases where there might be a special stipulation to the contrary, and looking for indemnity to the assets or the persons for whose benefit ultimately the business was carried on. It would be impossible for a tradesman in the ordinary course of business to ascertain for whose benefit the business was carried on, or what funds might be available and I do not think that the Court can be supposed to have intended by their action to place people in such a predicament."

In the same case, Lord Esher, M.R., explained the position of a receiver thus:

"The incidents of his relation to the Court are such as would, if they existed as between him and an ordinary person, constitute him an agent for such person; but it is of course impossible to suppose that the relation of agent and principal exists between him and the Court. What is the inference that necessarily arises? It must be that the intention is that he shall act in pursuance of his appointment on his own responsibility and not as an agent, because otherwise nobody will be responsible for his acts. The company cannot be liable, for he is not their agent and the Court clearly cannot be

1. (1903) I.L.R. 30 Cal. 937.
2. (1895) 1 Q.B. 276.

liable. Therefore any orders which he may give under such circumstances as manager must *prima facie* be taken to be orders given on his own responsibility and credit."

Sale, J., draws a distinction between a creditor's dealing with executors and trustees carrying on business for the benefit of the estate in their hands and his dealings with a receiver acting under orders of the Court but no such distinction was recognised by Rigby, L.J., who observed:

"I think that the notion upon which the Court has always proceeded, in exercising its jurisdiction to appoint a manager of a business, is, not that he is to be in the position of an agent, although there is no principal, but that he is to be in a position similar to that of persons who in a fiduciary capacity carry on a business, in the course of which contracts have to be entered into *e.g.* executors or trustees, who, by the terms of the instrument appointing them are directed to carry on a business for the benefit of others. The rule has always been that such persons are *prima facie* themselves personally liable, and they cannot get rid of liability on the contracts made by them merely by describing themselves in the contract as executors, or trustees."

The doctrine that a creditor has only a right of indirect recourse to the estate through the right of indemnity of the person who contracted the liability for the purposes of such estate in the course of its management which, Mr. Krishnaswami Aiyar concedes is well-established in the case of trustees and executors, has been applied in England also to loans borrowed by receivers. In *In re British Power Traction and Lighting Company Limited*,[1] Swinfen Eady, J., after quoting from the judgment of Jessel, M. R., in *In re Johnson*,[2] the passage:

"If the right of the creditors is, as is stated by Lord Justice Turner, the right to put themselves, so to speak, in the place of a trustee, who is entitled to an indemnity, of course, if the trustee is not entitled, except on terms to make good a loss to the trust estate, the creditors cannot have a better right,"

went on to say

"Reading "receiver and manager" in lieu of "trustee" the passage is exactly in point,"

and held that a creditor of a receiver who was in default could not claim against the assets of the estate anything beyond the extent of the receiver's net indemnity.

Another case brought to our notice by Mr. Krishnaswami Aiyar is the one reported in *Debi Prashad Dhandhania* v. *Mahesh Lal*[3] decided by the Patna High Court. In a suit for specific

1. (1910) 2 Ch. 470. 2. (1880) 15 Ch. D. 548 at 555.
3. (1925) 89 I.C. 32.

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performance of an agreement to assign a mortgage right, the defendant was appointed receiver to sue on the mortgage as it was about to become time-barred, and he borrowed moneys for the purpose of prosecuting the mortgage suit charging the mortgage interest, the subject-matter of the suit, under express orders of the Court. The latter suit was however, eventually allowed to be dismissed, specific performance having been decreed and the assignee himself having in the meanwhile purchased the equity of redemption in the mortgaged properties and the assignor drew the money deposited in Court by the assignee as a condition of his obtaining specific performance. Thereupon the lender sued the assignee and the legal representatives of the assignor for recovery of the amount lent. It was found that the receiver could not be made personally liable and that a decree on his bond hypothecating the mortgage interest would be barren as no suit could then be brought to enforce the mortgage. In these circumstances, the Court referred to *Mohari Bibi* v. *Shyama Bibi*[1], and held that the assets of the assignor in the hands of his representatives were liable. The ground of decision, as we read the judgment, appears to have been this: The money deposited in Court by the assignee for obtaining specific performance although it was not specifically charged with the amount borrowed by the assignor as receiver, represented the assignor's interest in the mortgage bond which was the interest charged and so, on the principle relating to substitution of securities became charged with the repayment of the loan; and such money having been drawn by the assignor his representatives were bound to repay the loan out of it. This decision can have no application to a case like the present where the receiver borrowed the money without creating any charge on the estate in his management.

Mr. Krishnaswami Aiyar also placed reliance upon the observations of Neville, J., in *In re London United Breweries Ltd. Smith* v. *London United Breweries Limited*[2]. That was a case where a receiver appointed by the Court in a debenture-holder's action having become bankrupt, the question arose whether the assets of the company realised by the receiver should go to the debenture-holders or to the trustee in bankruptcy for distribution among the creditors to whom the receiver incurred

1. (1903) I.L.R. 30 Cal. 937. 2. L.R. (1907) 2 Ch. 511.

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liability in the course of his management. The sureties of the receiver had made good his default and the estate therefore had not suffered any loss on that account. In those circumstances Neville, J., held that the creditors' liability should first be discharged out of the assets, observing,

"In my opinion, where the Court has appointed a receiver who has incurred liabilities in the proper management of the estate which was given to him to manage, the Court will see that those creditors are satisfied, either by the receiver, or, in case the receiver should become bankrupt or there should be any other reason making it advisable, by payment direct to the creditors out of the funds in Court. . . . . The Court will see that those who properly gave credit to the receiver, who was managing under the authority of the Court, have their debts discharged so far as the Court has funds in its hands."

As could be seen from the arguments of counsel for the trustee in bankruptcy, the claim for payment out of the assets of the estate for discharging the liabilities incurred by the receiver in the course of his management was based upon the receiver's right to indemnity against the estate, and the sureties, as already observed, having paid into Court the amount due by him to the estate, he was treated as not in default and the creditors were given the benefit of his full right of indemnity against the estate. The decision is, therefore, no authority for the proposition that the creditors who advance loans to a receiver are entitled to be paid out of the assets of the estate irrespective of the receiver's right of indemnity and we consider that the observations of the learned Judge must be understood in the light of the facts of that case—*See also* Kerr on Receiver, 10th Edition page 302, where it is pointed out that this decision is not in conflict with the principle enunciated in *In re British Power Traction and Lighting Compay Limited*[1].

Lastly, Mr. Krishnaswami Aiyar argued that the money advanced for the appellant having been admittedly utilised for payment of the *peiskkush* due to the Government on the estate, the appellant is entitled to be subrogated to the statutory first charge which the Government held on the estate in respect of the *peishkush* due. He cited *Chengalvaroya Reddi* v. *Udai Kavour*[2], in support of this contention. That was a case where a purchaser of one of the villages in a Zamindari paid the *peishkush* due to the Government on the Zamindari to set aside a revenue sale of all the villages and claimed the amount from the Zamindar and others interested in the rest of the villages

1. (1910) 2 Ch. 470.   2. A.I.R. (1936) Mad. 752.

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with a charge on such villages for the amount claimed. The case has no application to the facts here as the appellant advanced the loan on the personal credit of the receiver and even assuming that the statutory charge for revenue payable to Government could enure for the benefit of a person who pays the revenue the appellant cannot claim the benefit of it because he did not make the payment to the Government.

For the reasons indicated, we are of opinion that the decree of the Court below has awarded to the appellant all the relief to which he is entitled under the law and this appeal should be dismissed with costs of the contesting respondents 2 and 3. One set.

K. S. *Appeal dismissed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Bombay.]

PRESENT:—VISCOUNT MAUGHAM, LORD WRIGHT AND SIR GEORGE RANKIN.

Mahomedally Tyebally and others .. *Appellants**

v.

Safiabai and others .. *Respondents.*

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Mahomedan Law—Administration of estate—Suit against co-heirs by person entitled to share of estate—Period of limitation applicable—Death of interested party—Abatement of suit against him—Court's discretion to add deceased's representative as party to suit—Limitation Act, (IX of 1908), Arts. 106, 120, 123 and 144—Civil Procedure Code (V of 1908), O. 1, r. 10; O. 22, r. 4 (3).

The heirs of a Mahomedan succeed to his estate in specific shares as tenants-in-common, and a suit by a co-heir or his representative against heirs, for an administration of what has come to their hands from their father of whom they are the heirs is governed as regards immoveable property by Art. 144 of the Limitation Act and as regards moveables by Art. 120.

Where one of the defendants to a suit dies and the suit abates as against him under Civil Procedure Code, O. 22, r. 4 (3), the suit does not abate as a whole. Further it is open to the Court in its discretion under O. 1, r. 10 subsequently to add as a party to the suit the representative of the party who has died.

Two brothers, *E* and *S*, who were Shia Mahomedans, carried on a business together and were co-owners of property. *E* died in 1904, his heirs being his widow, mother, son and 2 daughters. In 1923, shortly before his death, *S* entered into an agreement defining the respective interests of himself and *E*'s estate in the various joint properties, the parties on the one side being all *E*'s heirs except his mother whose right to 1/6 of *E*'s estate the

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* P. C. A. No. 15 of 1939. 8th July, 1940.

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agreement ignored. After *S*'s death the agreement was approved in an agreement made in September, 1924, between *S*'s heirs and those of *E*, again excluding the mother's share in *E*'s estate. That 1/6 share had in reality on her death in 1912 devolved as to 1/2 (that is 1/12 of *E*'s estate) on *S*, and as to 1/4 (that is 1/24 of the estate) on her surviving daughter (*i.e.* the sister of *S* and *E*), and as to the remaining 1/4 on the children of her deceased daughter, one of which daughters was the plaintiff. A suit claiming partition on the basis of the agreement of September, 1924, brought by *E*'s heirs against *S*'s heirs, was decreed in July, 1926. The plaintiff having brought the present action in July, 1930 to which the heirs of *E* or their representatives, and the heirs of *S* or their representatives were defendants, claiming her part of the 1/6 share of *E*'s estate which should have come to her through the mother of *E* and *S*, *S*'s and *E*'s surviving sister also a defendant died. No application having been made to add the deceased sister's daughter *R*, as a party to the suit, the suit abated as against that sister under C. P. Code, O. 22, r. 4 (3) but the Court added *R* as a defendant under O. 1, r. 10.

Held (1) that the suit was not barred by limitation. (2) That it did not abate as a whole because of its abatement as against the deceased sister. (3) That in view of the agreement of 1923 and 1924, which the plaintiff did not challenge in her plaint, the suit could succeed only against the heirs of *S* and not against those of *E*.

Appeal from a decree of the High Court, Bombay in its appellate jurisdiction, dated 8th September, 1936 (Beaumont, C.J., and Rangnekar, J.) reversing a decision of that Court in its ordinary original civil jurisdiction dated 17th February, 1936 (Barlee, J.).

The suit was brought by a member of a Shia Mahomedan family claiming a share of the estate of her deceased uncle Ebrahimji which share should have devolved upon her mother through Ebrahimji's mother Jelumboo, who was one of his heirs. The suit was brought against the heirs of Ebrahimji or their representatives on the one hand, and against the heirs of Ebrahimji's brother, Sarafally, on the other hand, other interested parties also being impleaded. The trial Judge held the suit barred by Art. 106 of the Limitation Act. The appellate Court reversed that decision, directing an account to be taken of the estate of Ebrahimji come to the hands of his heirs or their representatives. Those persons now appealed to His Majesty. The facts are fully stated in the judgment of the Board.

Sir T. J. Strangman, K. C. and *A. G. P. Pullan* for Appellants.—This action is barred by limitation because, as we submit, it is not an action for administration of an estate, but one for partition and for a share in the estate brought against those in possession of it. Were the action of the former kind it would not be barred, but being of the latter, it is subject to a limitation period of 90 days.

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Next we submit that the action abated as a whole by reason of its abating as against Sakinaboo's daughter, Rukhiaboo. Sakinaboo was a necessary party to the suit. On her death it was essential that her representative should be brought on the record within the prescribed time. That was not done and the whole action abated (counsel referred to Mulla's Civil Procedure Code (10th Ed. p. 862).

(*Sir George Rankin.*—But does this not depend on the nature of the suit?)

(*Lord Maugham* referred to C.P. Code, O. 1, r. 9 and *Parekh* interfered to call attention to S. 151 of the Code in reference to the Court's inherent powers.)

[Dealing further with the question of limitation, counsel referred to Arts. 106 and 120 and to S. 6 of the Limitation Act, and to *Mohammad Wali Khan* v. *Mohammad Mohi-ud-din*[1].] Art. 123, as the authorities show, does not apply because under Mahomedan Law there is no particular individual charged with the distribution of the estate. Art. 144 which prescribes a period of twelve years dating from the time when possession becomes adverse in claims for possession of immoveable property is applicable to immoveables and ouster must be proved. Art. 120, which for suits for which no period is provided elsewhere in the Act prescribes a period of six years to begin when the right to sue accrues, governs moveables and the question of ouster does not then arise. We submit that the right to sue for distribution of the estate arose at the moment of Ebrahimji's death.

(*Sir George Rankin.*—But this was not a suit for distribution, it was for recovery of a share of the estate which had already been distributed—according to the plaintiff to the wrong persons).

My last point is that the plaintiff cannot in any event recover against the heirs of Ebrahimji and their representatives. They entered into an agreement with Sarafally and that agreement stands. Indeed the plaintiff in her plaint does not challenge it. Sarafally's heirs could not claim to go behind the agreement. Persons claiming through Sarafally took no account of the fact that a portion of Ebrahimji's estate came to him through his mother, Jelumboo. It is accordingly not as against the heirs of Ebrahimji that the plaintiff is entitled to recover what is rightfully hers. The agreement of 1924 was embodied in the decree passed in the partition suit. That creates an estoppel by record.

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1. (1919) 24 C.W.N. 321.

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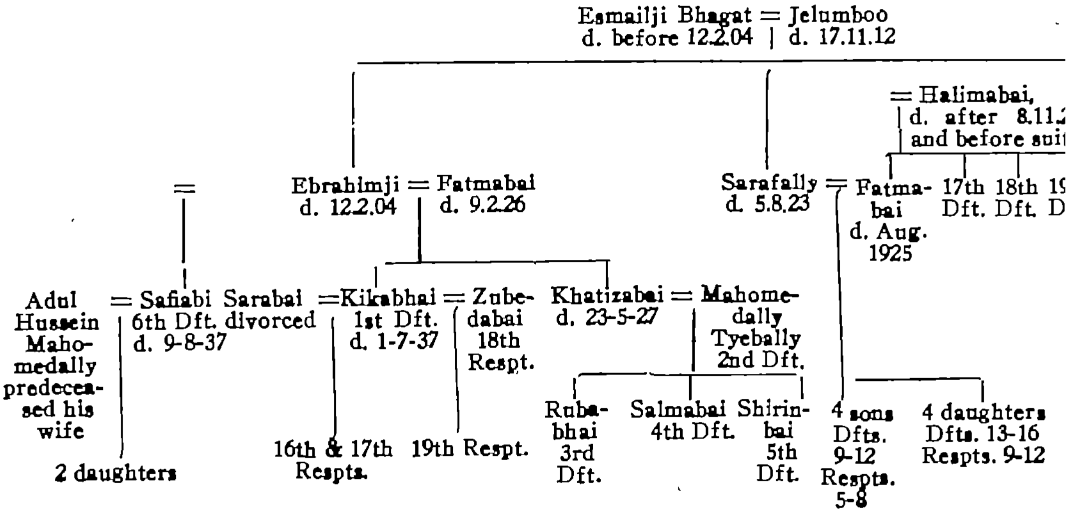
J. M. Parekh for the plaintiff-respondents and other interested parties was called on to argue only on the question of the agreement and on the effect of allowing it to stand. He submitted that the plaintiff could not be met with estoppel by record or conduct.

8th July, 1940. Their Lordships' judgment was delivered by

SIR GEORGE RANKIN.—This case concerns the administration of the estate left by one Ebrahimji, who died in 1904. He was a Dawoodi Borah governed by the Shia school of Mahomedan law and had carried on business in Bombay with his only brother Sarafally as merchants and commission agents. A pedigree table of the family is given hereunder. They belonged to Kapadvanj, in the Kaira district of the Bombay Presidency, and the brothers were co-owners of certain immoveable properties there in addition to their interests in their ancestral home. Their Bombay business was a profitable one and a house in Samuel Street in Bombay had been acquired out of the profits.

The heirs of Ebrahimji, according to the Shia system of "sharers" and "residuaries" were (1) his mother Jelumboo entitled to a sixth share, (2) his widow Fatmabai entitled to an eighth share, (3) his son Kikabhai, and his two daughters by different wives, (4) Safiabai and (5) Khatizabai. These children took shares in the residue left after deduction of the mother's and widow's shares, the son taking twice as much as a daughter. His brother Safarally and his two sisters Sakinaboo and Amtoolaboo were not heirs. The business was continued by Sarafally, the share of Ebrahimji being left in the business. Jelumboo lived with her son Safarally until her death in 1912. Another Bombay house—in Abdul Rehman Street—was acquired out of the profits in or about 1917. Amtoolaboo died in 1920 leaving as her heirs two daughters, the plaintiff Safiabai and Asmabai (defendant No. 8).



Esmailji Bhagat = Jelumboo
d. before 12.2.04 | d. 17.11.12
= Halimabai,
d. after 8.11.
and before sui
Ebrahimji = Fatmabai
d. 12.2.04 | d. 9.2.26
Sarafally = Fatma-
d. 5.8.23
bai
d. Aug.
1925
17th Dft.
18th Dft.
Adul Hussein Mahomedally predeceased his wife
= Safiabi
6th Dft.
d. 9-8-37
Sarabai divorced
=Kikabhai
1st Dft.
d. 1-7-37
= Zubedabai
18th Respt.
Khatizabai
d. 23-5-27
= Mahomedally Tyebally
2nd Dft.
Rubabhai
3rd Dft.
Salmabai
4th Dft.
Shirinbai
5th Dft.
4 sons
Dfts. 9-12
Respts. 5-8
4 daughters
Dfts. 13-16
Respts. 9-12
2 daughters
16th & 17th Respts.
19th Respt.

In 1923 Sarafally was ill; he died in August of that year. On the 13th July before his death he entered into an agreement in writing intended to regulate and define the respective interests of himself and Ebrahimji's estate in the business and in the various properties at Bombay and Kapadvanj. The other parties to this agreement were Ebrahimji's son Kikabhai, his daughter Safiabai and his widow Fatmabai. Provision was made for the other daughter Khatizabai joining therein, which she afterwards did. The agreement treated the widow, son and daughters of Ebrahimji as his only heirs, ignoring the facts that his mother Jelumboo had inherited from him a sixth share of his estate, and that of her interest only a half had devolved on Sarafally, the other half belonging to his sister Sakinaboo and the two daughters of his deceased sister Amtoolaboo—namely, the plaintiff and Asmabai.

On this footing the agreement provided that the respective shares of Sarafally and Ebrahimji's estate should as to two plots of land in Kapadvanj be equal, but as to the business and the houses in Abdul Rehman Street and Samuel Street should be as follows: 10 annas to Sarafally and 6 annas to Ebrahimji's estate. The ancestral house at Kapadvanj had already been partitioned by metes and bounds.

On Sarafally's death (5th August, 1923), his estate devolved on his widow, his four sons and his four daughters. On the 24th September, 1924, an agreement in writing was made between them as Sarafally's heirs of the one part and the widow and three children of Ebrahimji as representing Ebrahimji's estate of the other part. No notice was taken in this agreement of Jelumboo or her heirs as having any interest in the estate of Ebrahimji. The agreement of 13th July, 1923, was approved. The house at Abdul Rehman Street and its contents and two immoveable properties at Kapadvanj were to be taken by Ebrahimji's heirs, and Sarafally's heirs were to get the Samuel Street house and the business. These assets were to be taken at certain valuations: the figure for the business to be fixed by one Metaji Chaturbhuj Motichand who was to make up the final account. Some properties at Kapadvanj were not included in this arrangement but it was recited that these had already been divided.

On the 11th December, 1924, the widow and son of Ebrahimji together with one daughter (Khatizabai) sued for

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partition in accordance with the agreement of 24th September, 1924. The other daughter (Safiabai) was made a defendant but the suit was brought against Sarafally's eight children and widow as representing his estate: a preliminary decree for partition and accounts was obtained on 5th May, 1925, and a final decree on 11th June, 1926. The widow of Ebrahimji died meanwhile in 1925 and her interest passed to her children. The widow of Sarafally died in 1926; this produced certain changes in the representation of Sarafally's estate which will be taken account of in due course.

On 17th July, 1926, Ebrahimji's son Kikabhai sued his sister Khatizabai and his half-sister Safiabai for sale and division of the property which had come to them under the decree in the previous suit. Safiabai by her written statement filed on 8th November, 1926, set up that Jelumboo, her father's mother, was one of his heirs, and that the present plaintiff together with her sister Asmabai and her aunt Sakinaboo and other persons should be brought before the Court as necessary parties. Khatizabai having died in 1926, her husband and children were substituted in her stead. On 21st February, 19 9, a decree was passed by consent directing that Safiabai should take a sum of Rs. 51,500 with certain interest in full satisfaction of her share in her father Ebrahimji's estate. This was paid to her and a release was executed by her on 31st January, 1930. Their Lordships do not stop to consider the propriety of these proceedings having regard to the facts brought to notice by the lady's own written statement as already mentioned.

On 23rd July, 1930, the present suit was filed. At some date before that but after 1926 the death of Halimabai occurred. She was the mother of Sarafally's wife and had been one of her heirs. The result of Halimabai's death was that the persons entitled to the estate of Sarafally were now his four sons his four daughters and three sisters of his wife. These eleven persons may be described as the second set of defendants to the present suit—namely, defendants 9-19 inclusive. The plaintiff was Safiabai, one of the two daughters of Amtoolaboo, sister to Ebrahimji. The first set of defendants (so to call them) were Kikabhai and Khatizabai's representatives; these were defendants 1-5. Among other defendants was Kikabhai's half sister Safiabai (defendant 6) who has been paid out as already mentioned. The plaintiff's sister, Asmabai, was defen-

dant 8 and the plaintiff's aunt, Sakinaboo, was defendant 7. These two ladies were in the same position as the plaintiff, being persons entitled along with the plaintiff to a half of the one-sixth interest which Jelumboo had in her son Ebrahimji's estate. The other half of that one-sixth interest belonged at the date of the suit to Sarafally's representatives—that is defendants 9-19—unless by the agreements of 1923 and 1924 they had lost their interest.

It is necessary to direct attention to the frame and scope of the suit. It was brought on the Original Side of the High Court at Bombay. The plaint set forth the various relationships of the parties and the devolution of interests in the respective estates of Ebrahimji and Sarafally. It recited the agreements of 13th July, 1923, and 23rd September, 1924, and the two previous suits brought thereupon; it stated that the plaintiff had had no knowledge thereof and had not consented thereto; but it did not claim that the plaintiff's interest in the estate of Ebrahimji should be ascertained as between herself and the estate of Sarafally as though these agreements had never been made. In effect, as their Lordships read the plaint, it merely asked that Jelumboo's one-sixth share in what Ebrahimji's widow and children had received as representing his estate should be given to the persons entitled thereto. Defendants 9-19, Sarafally's representatives, supported the plaintiff: the contesting defendants were the defendants 1-5.

The suit having been filed on 23rd July, 1930, Sakinaboo (sister of Ebrahimji), who was defendant No. 7, died on 14th March, 1932, leaving her daughter Rukhiaboo as her heir. No application to make the daughter a party to the suit having been made within 90 days, the suit abated as against Sakinaboo under Order 22, rule 4, clause 3, of the Civil Procedure Code. No application was made within 60 days thereafter to set aside the abatement under rule 9 of the same Order. But on 10th May, 1936, Rukhiaboo herself applied to be brought on the record in her mother's stead and claimed to share in the relief asked by the plaint. Acting under rule 10 of Order 1 of the Code, Barlee, J., on 22nd January, 1936, added her as 7th defendant to the suit. At the trial the learned Judge on 17th February, 1936, dismissed the suit, holding that the plaintiff's claim was within article 106 of the schedule to the Limitation Act, 1908, which prescribes a period of three years from the

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date of dissolution for a suit for an account and a share of the profits of a dissolved partnership. On appeal this decree was set aside by a Division Bench (Beaumont, C.J., and Rangnekar, J.) who directed an account to be taken of the estate of Ebrahimji come to the hands of Kikabhai and the heirs of Khatizabai and ordered that the estate of Ebrahimji be applied in due course of administration. This decree was dated the 8th September, 1936, and is the decree from which the present appeal is brought by the heirs of Khatizabai.

It is not contended that the plaintiff's claim is for anything more than her *prima facie* rights in Ebrahimji's estate, but three points are taken for the appellants. It is said (1) that the suit had come to an end by reason that it had abated as against Sakinaboo, (2) that it is barred by limitation, and (3) that defendants 9-19 can make no claim against the appellants in respect of Sarafally's interest in Jelumboo's estate as this would be contrary to the agreements of 13th July, 1923, and 23rd September, 1924, and to the decree of the Court made (11th June, 1926) in the suit of 1924 which gave effect to these agreements.

On the first point their Lordships are of opinion that it is impossible to hold that the suit for administration of Ebrahimji's estate came to an end by reason of abatement as against Sakinaboo. Sakinaboo and her daughter Rukhiaboo are persons having the same interest as the plaintiff and though the plaintiff by reason of laches may be supposed in certain circumstances to lose her rights as against them, it is paradoxical to suppose that the plaintiff's laches have deprived them of rights. There is nothing in Order 22 to take away their interest in the estate of Ebrahimji and they could (so far as that Order is concerned) have brought an administration suit of their own, notwithstanding any abatement of the plaintiff's suit. The presence of someone to represent Sakinaboo's interest was very proper and highly desirable in the interest of every other party, but it is putting it too high to say that the suit could not possibly go on without her. It not uncommonly happens, in a suit for administration, that for one reason or another a particular interest is not represented before decree, but is either provided for by the decree, or is asserted at a later stage under the decree, or is given effect by a party being permitted to attend certain accounts and enquiries so as to be bound by the

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result. Still, it would have been very bad practice if in the present case Rukhiaboo had not been joined as a party and this was properly done by Barlee, J., on her own application under O. 1, r. 10. Their Lordships are of opinion that it is open to the judge in his discretion under O. 1, r. 10, to add as a party to the suit the representative of a person against whom the suit has abated for the purpose of giving effect to the rights of the parties. The contention that the plaintiff's suit had abated as a whole is fundamentally mistaken. It involves that the plaintiff was claiming relief against Sakinaboo, that because Sakinaboo's heirs were entitled to resist the grant of this relief in the present suit by reason of the plaintiff's laches, the plaintiff could not be given relief against the present appellants. No step in this reasoning can be justified.

It was not contended before the Board that the plaintiff's suit is of the character mentioned in article 106 of the Limitation Act. It is a suit against certain Mahomedan co-heirs by a person entitled to part of the interest of an heir and the High Court on appeal rightly held that to such a suit neither article 106 nor article 123 is applicable. The heirs of a Mahomedan succeed to his estate in specific shares as tenants in common and the plaintiff's suit against the son and daughters of Ebrahimji for due administration of what came to their hands as property left by their father is governed as regards immoveable property by article 144 and as regards moveables by article 120: (*Mahomed Riasat Ali* v. *Hasin Banu*[1], *Ghulam Muhammad* v. *Ghulam Husain*[2]). Upon the proper application of article 120 as between tenants in common it will be sufficient to refer to *Musammat Bolo* v. *Musammat Koklan*[3], and *Yerukola* v. *Yerukola*[4]. It does not appear that the widow son or daughters of Ebrahimji received what was to come to them under the agreement of 24th September, 1924 until the suit of 1924 had been decreed in 1926 which is well within 6 years of the filing of the present suit on 23rd July, 1930. But their Lordships think it right to add that on the evidence they find no reason for holding that there had been an ouster or exclusion of the plaintiffs prior to 23rd July, 1924: indeed there are concurrent

1. (1893) L.R. 20 I.A. 155. 2. (1931) L.R, 59 I.A. 74.
3. (1930) L.R. 57 I.A. 325.
4. (1922) 42 M.L.J. 507 : I.L.R. 45 Mad. 648.

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findings of the courts in India which are inconsistent with any such contention.

The third point taken by the appellants is in their Lordships' opinion good against those claiming under Sarafally an interest in Jelumboo's one-sixth share of Ebrahimji's estate. As the suit of 1924 resulted in a decree there is an element of estoppel by record but the matter may be put sufficiently as resting on agreements made in 1923 and 1924 between Sarafally and Sarafally's heirs on the one part and the widow and children of Ebrahimji on the other. Defendants 9-19 cannot claim to make the present appellants liable on the footing that Sarafally was entitled to more than these agreements gave him, though it be true enough that since 1912 he had been entitled to a half of his mother's one-sixth share. If the plaintiff by her suit had challenged the rights of Sarafally's heirs under the agreements of 1923 and 1924 it may well be that she could have required Sarafally's heirs to account upon a footing which would have made it impossible to give any effect to these agreements even as between the parties to them. But the plaintiff by her suit has not sought relief upon any such basis and the agreements have their effect between Sarafally (and his representatives) and the children of his brother.

Their Lordships are of opinion that on this point the appeal succeeds but only as against defendants 9-19 (respondents 5-15). The decree of the High Court dated 8th September, 1936, should be varied (*a*) by limiting the second of the declarations therein made to a declaration that the plaintiff and the 7th and 8th defendants are entitled to a one-twelfth share in the estate of Ebrahimji Esmailji Bhagat, the plaintiff and the 8th defendant being each entitled to one-quarter of the said one-twelfth share and the 7th defendant being entitled to the remaining half thereof; (*b*) by adding to the order for administration the words "so far as regards the one-twelfth share to which the plaintiff and the 7th and 8th defendants are entitled as aforesaid."

Their Lordships will humbly advise His Majesty accordingly. They see no need to disturb the High Court's order as to costs. As regards the costs of this appeal the appellants must pay one-half of one set of costs to the contesting

respondents—that is, respondents 1, 3 and 5-12 who have joined in resisting the appeal.

P.C. Mahomedally Tyebally v. Safiabai. Sir George Rankin.

Solicitors for the Appellants: *T. L. Wilson & Co.*

Solicitors for the Respondents: *Lattey & Dawe.*

R. C. C. *Decree of the High Court varied.*

K. S.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Appellate Jurisdiction.]

PRESENT:—MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

Swarnam Iswariah v. Kannappa Chetty.

Mrs. Swarnam Iswariah .. *Appellant* (Plaintiff—Respondent)*

v.

K. M. S. R. M. Kannappa Chetty .. *Respondent (Defendant—Applicant).*

Madras Agriculturists' Relief Act (IV of 1938). *S.* 28, *rules framed under—R. 7*—Intra vires.

A debtor proved that he had sold in February, 1935, his house property situate within a Municipality and that the property tax was actually recovered from the purchaser during the relevant period though the debtor's name continued in the municipal register. The trial Court relying on r. 7 of the rules framed under the Agriculturists' Relief Act by the Provincial Government permitted the debtor to let in evidence as to sale of his property etc., in rebuttal of the certificate issued by the Collector under S. 26 of the Act and held that the debtor was not excluded from the definition of the term 'agriculturist'. On appeal it was contended that r. 7 was inconsistent with proviso *C* to S. 3 (*ii*) of the Act and therefore *ultra vires.*

Held, that though the matter was by no means free from ambiguity, the language of proviso C to S. 3 (*ii*) afforded considerable support to the view that the Legislature intended to disqualify from a claim to be an agriculturist only a person from whom tax had been demanded by virtue of ownership, and that there was nothing in r. 7 repugnant to that apparent intention; nor could it be said that the rule gave to the proviso a meaning which was not its probable meaning. It was within the powers of the Provincial Government to make a rule which merely removed an ambiguity in a clause in a statute. The rule is therefore *intra vires* the Provincial Government.

Appeal from the order of the Hon'ble Mr. Justice Gentle dated the 25th November, 1940 and passed in the exercise of the Ordinary Original Civil Jurisdiction in Application No. 2258 of 1939 in C. S. No. 67 of 1934.

V. Radhakrishniah and *R. Venkataraman* for Appellant.

M. Subbaroya Aiyar and *T. S. Krishnamurthi Aiyar* for Respondent.

* O. S. A. No. 1 of 1941. 27th February, 1941.

Swarnam Iswariah v. Kannappa Chetty. — Wadsworth, J.

The judgment of the Court was delivered by

Wadsworth, J.—This appeal arises from a decision of our learned brother Gentle, J., on a matter relating to proviso *C* to S. 3 (*ii*) of Madras Act IV of 1938 and the connected r. 7 of the rules framed under that Act by the Government of Madras.

The appellant here is the decree-holder. She obtained a decree in 1934 on a promissory note. The respondent filed an application under S. 19 of Act IV and it was resisted on the allegation that the respondent was not an agriculturist by reason of his being assessed to property tax in respect of a house situate within the Municipality of Devakottah. The respondent proved that the house in question had been sold by him on 10th February, 1935. This was met by an allegation that the sale was a benami transaction, which allegation the appellant failed to substantiate by the necessary evidence. The learned Judge consequently held, applying r. 7, that the person in whose name the assessment to property tax stood was not the owner of the property during the relevant period and that therefore he was not disqualified by reason of the mere inclusion of his name in the municipal registers from being an agriculturist under the Act. We should add that there was evidence before the learned Judge that the tax for the relevant period was actually recovered from the purchaser.

In appeal before us, an attempt has been made to dispute the finding on the question of benami by the argument that the facts could only be established in the cross-examination of the respondent and that the respondent had not gone into the box. It seems to us that when no evidence at all was tendered on behalf of the appellant and apparently no request was made for the cross-examination of the respondent on his affidavit, it cannot be held that the benami theory, in respect of which the onus clearly lay upon the appellant, was established merely by the failure of the respondent to offer himself for cross-examination.

A more substantial contention is that r. 7 of the rules framed by the Provincial Government is inconsistent with proviso *C* to S. 3 (*ii*) and therefore beyond the powers of the Government under S. 28. S. 28 of the Act gives to the Provincial Government power to frame rules for removing any difficulty in giving effect to the provisions of the Act, provided

Swarnam Iswariah v. Kannappa Chetty.

Wadsworth, J.

that the rules shall be consistent with the provisions of the Act. Proviso *C* excludes from the category of agriculturists:

"Any person who has within the two years immediately preceding 1st October, 1937, been assessed to property or house tax in respect of buildings or lands other than agricultural lands under the Madras District Municipalities Act . . . . provided that the aggregate annual rental value of such buildings and lands, whether let out or in the occupation of the owner, is not less than Rs. 600."

It is to be noted that this proviso, though it does not expressly make ownership an integral part of assessment, contemplates that the person assessed shall be the owner. A Bench consisting of Burn and Stodart, JJ., had to deal with a case, *Swaminatha Odayar* v. *Srinivasa Aiyar*[1], in which it was contended that mere ownership of property liable to tax disqualified the owner thereof from being an agriculturist, regardless of whether there was or was not an assessment and the learned Judges held that the proviso to S. 3 excludes from the benefit of the Act only persons who have been assessed to property tax and it does not exclude those who, though liable to property tax, have for some reason or other escaped assessment. In the particular case before the learned Judges, the nominal assessee was dead and it might well be argued in such a case that if it is established that there has actually been a demand made for the tax on the building from the owner, this demand might amount to an assessment even though a dead man's name is shown in the municipal registers. More especially if the person upon whom the demand is made actually pays the tax. That is a matter which is not before us and on which we do not wish to express any considered opinion. For the present it is sufficient to say that mere ownership apart from assessment will not disqualify a person under proviso *C*. It does not, however, follow that a mere registry in the assessment registers and a repetition in the demand notice of the name so shown in the register would constitute an assessment apart from ownership, so as to import the disqualification under proviso *C*. We had to make a reference to this possibility in the case of *Sarveswara Rao* v. *Umamaheswara Rao*[2], where we observe:

"It may well be argued that proviso *C* contemplates not only the assessment of an individual, but also the ownership by that individual of the property in respect of which he has been assessed."

It is necessary now to go further into this contention. Strictly speaking, under the Madras District Municipalities Act,

1. (1939) 2 M.L.J. 495. 2. (1940) 2 M.L.J. 841 at 844.

Swarnam Iswariah v. Kannappa Chetty. — Wadsworth, J.

the assessment is imposed, not on the individual, but on the property. The property tax under S. 86 has to be paid by the owner and the only contingency in which liability might be imposed on a person who is not the owner seems to be under S. 88 (4) whereby in case of a transfer, if the transferor omits to give notice of the transfer to the municipality, both the transferor and the transferee may be held liable for the tax. But in such circumstances, if in fact, though there has been no formal notice, the municipal officials are well aware of the transfer and, without making any change in their registers, if the tax is in fact demanded from the transferee and paid by him, can it be said that the transferor who ceased to be the owner and who has neither been asked for the tax nor has paid it, has been assessed to property tax so as to disqualify him under proviso *C*? The word 'assess' is one which is susceptible of several different meanings. According to the dictionary it may mean:

> "to fix the amount of the tax 'or' to determine the amount and impose the tax upon an individual 'or merely' to impose a tax upon an individual 'or' to estimate officially the value for purpose of taxation."

In view of these different meanings of which the word 'assess' is susceptible and of the fact that the liability to property tax under the District Municipalities Act depends primarily upon ownership, can it be contended that the use of the word 'assessed' in proviso *C* necessarily implies the mere registry of an individual as the person liable and does not imply the full process of demanding the tax from the person as the owner of the property. It seems to us that the matter is by no means free from ambiguity and that the use of the word 'owner' in the last sentence of this proviso gives considerable support to the view that the Legislature intended to disqualify from a claim to be an agriculturist only a person from whom tax had been demanded by virtue of ownership. This is a view which is consistent with the terms of the District Municipalities Act which was expressly in the contemplation of the Legislature when this proviso was enacted and it is a view, for which there is, much to be said from the practical point of view. The Provincial Government have enacted r. 7 making it clear that the term 'assessed to property tax' will not cover the case of a person in whose name an assessment has been made, when he was not in fact the owner of the property during the relevant period. We do not find anything repugnant to the apparent

intention of proviso *C* in this rule, nor do we think that it can be said that this rule gives to the proviso a meaning which is not its probable meaning. It is within the powers of the Local Government to make a rule which merely removes an ambiguity in a clause of the statute. That is, in our opinion, the effect of this rule and we see no reason to hold that the rule is beyond the powers of the Provincial Government.

In the result therefore the appeal is dismissed with costs.

K. S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

Vasireddi Pitchayya .. *Petitioner* (7th Defendant —Petitioner)*

v.

Lavu Subbayya .. *Respondent (Transferee-decree-holder—1st Respondent).*

Madras Agriculturists' Relief Act (IV of 1938), Ss. 19 and 20—Partner of a firm—Firm indebted—Decree making partners personally liable—Partner agriculturist—Whether entitled to apply for benefit under the Act.

A debt incurred by a partnership is really a debt incurred by the partners for which each of them is liable. And, if a partner, who is by a decree of Court made personally liable for the debt of the firm, is an agriculturist he is entitled to apply under Ss. 19 and 20 of Act IV of 1938 for scaling down.

Appeal treated as a Civil Revision Petition under S. 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the Court of the Subordinate Judge of Tenali dated 10th August, 1938 and passed in C. M. P. No. 474 of 1938 in O. S. No. 106 of 1930.

K. Kotayya for Appellant.

Ch. Raghava Rao for Respondent.

The judgment of the Court was delivered by

Wadsworth, J.—This appeal has been treated as a revision petition and the appellant will pay the deficient court-fee.

The appellant applied under Ss. 19 and 20 of Madras Act IV 1938 to scale of down a decree. The decree in question was

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* C. R. P. No. 1865 of 1940 5th November, 1940.
(A. A. O. No. 86 of 1939 converted into C. R. P.).

Pitchayya v. Subbayya. — Wadsworth, J.

based on a debt due by the appellant and others as members of a firm and the cause title treats the firm as the first defendant and the managing partners as defendants 2 to 9. The appellant is the seventh defendant. The lower Court has rejected the application on the ground that a firm is not a person under the definition in S. 3 (1) of the Act and therefore a debt incurred by a firm is not one which can be scaled down and if that debt is due from an agriculturist, he cannot get the benefits of the Act because, the debt was not incurred by him *qua* agriculturist. We are unable to accept this reasoning. A debt incurred by a partnership is really a debt incurred by the partners for which each of them is liable. This is recognised by the decree which makes the appellant and his partners personally liable. The appellant is therefore a judgment-debtor with a liability and if, as appears to be the case, he is an agriculturist, he is entitled to apply under Ss. 19 and 20. The lower Court has not gone into the questions arising out of the process of scaling down. We are informed that the whole of this application will become unnecessary if the appeal now pending against another order recording satisfaction of the decree is dismissed.

This appeal treated as a revision petition is allowed with costs and the application is remanded to the lower court for disposal. The lower court will keep the application pending until orders have been passed on the pending appeal (C. M. A. No. 225 of 1939) and will dispose of it after judgment therein.

K. C. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE LAKSHMANA RAO.

Sivalinga Prasad, *In re.*

Vasireddi Sivalinga Prasad .. *Petitioner* (Accused).*

Indian Penal Code (XLV of 1860), S. 504—Speech of a person in a meeting—Abuse of individuals who were absent—Whether conviction under S. 504 sustainable.

Where a person addressed a meeting and in the course of his speech on the inam legislation abused some persons and the persons abused were not present at the meeting, he could not be convicted under S. 504, Indian Penal Code.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying that the High Court will be pleased

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* Crl. R. C. No. 24 of 1940 (Crl. R. P. No. 21 of 1940). 31st July, 1940.

to revise the order of the Court of the Joint Magistrate of Bezwada in C. C. No. 13 of 1939. Sivalinga Prasad, *In re.*

A. Lakshmayya for Petitioner.

The Public Prosecutor for the Crown.

The Court passed the following

ORDER.—The petitioner was an organising Secretary of the Andhra Provincial Ryots Association and he addressed a meeting of the ryots of Peddavaram in the open space in front of the house of P.W. 1, the Kamatam agent of the Zamindarini of Muktyala on the night of 21st January, last. He abused the Zamindarini and her agents in the course of his speech on the inam legislation but neither the Zamindarini nor her agents were present at the meeting and as rightly conceded the conviction of the petitioner under S. 504, Indian Penal Code is unsustainable. It is therefore set aside and the fine if levied will be refunded.

K. C.   *Conviction set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE MOCKETT.

S. Kuppuswamy Chettiar .. *Appellant** (*Respondent*)

v.

Subbaraya Chettiar .. *Respondent* (*1st Petitioner*).

Kuppuswamy Chettiar *v.* Subbaraya Chettiar.

Practice—Sanction to prosecute for offences against public justice—Considerations—Procedure—Appeal—Desirability of giving notice to the Public Prosecutor rather than to the Government Pleader.

In sanctioning a prosecution for offences committed against public justice the Court should consider not only whether there is a *prima facie* case but also whether it is in the public interests to allow criminal proceedings to be instituted. Though it is a civil matter, owing to the nature of the proceedings it is desirable that in appeals in such matters notice should go to the Public Prosecutor rather than to the Government Pleader.

Appeal against the order of the District Court of North Arcot dated the 25th day of March, 1940, and made in I. A. No. 6 of 1940 (I. A. No. 702 of 1937 in I. P. No. 36 of 1934 on the file of the Court of the Subordinate Judge of Vellore).

K. S. Jayarama Aiyar and *G. Gopalaswami* for Appellant.

K. V. Ramachandra Aiyar for Respondent.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

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* A. A. O. No. 240 of 1940.   10th February, 1941.

Kuppuswamy Chettiar v. Subbaraya Chettiar.

The Court delivered the following

JUDGMENT.—This is an appeal against the order of the learned District Judge of North Arcot directing that a complaint should be laid in the Court of the Magistrate having jurisdiction charging the petitioner with offences under Ss. 199, 209, 210 and 420, Indian Penal Code. I think it is clear from the decision in *Muniswami Mudaliar* v. *Rajaratnam Pillai*[1], that in sanctioning a prosecution the Court should consider not only whether there is a *prima facie* case but also whether it is, in the words of Coutts Trotter, J., in the above case, 'against the public interest to allow criminal proceedings to be instituted' but which I respectfully suggest must also imply the consideration as to whether it is in the public interests they should be instituted. In this case the offence on which these complaints are based was committed between the 30th January, 1937, and 7th April, 1937. On the 9th April, 1937 the money said to have been obtained on 7th April, by means of the offences alleged was returned voluntarily by the petitioner to the Official Receiver. April 8 was a holiday. No action was taken by the present respondent until June, when an application is said to have been made for papers. Not until the 10th September, 1937, was an application made to prosecute. The case has had a chequered career. It came before a Subordinate Judge who in considering the matter stated that 'the respondent stands self-condemned. He admittedly made a false claim before the Official Receiver and obtained payment.' The Subordinate Judge considered that the long delay in making the complaint by the respondent stood in the way of prosecuting the present appellant. If he considered this was a matter of law, he was wrong. If he considered that it was an ingredient assisting him to arrive at his decision, he might have considered the element of delay with all the other circumstances. The District Judge set aside that order and directed the matter should be reconsidered on grounds with which I am not wholly in agreement. They amount to this: Who is the worse offender—the petitioner in this case or the respondent? I. A. No. 702 of 1937 was heard on the 25th March, 1940, and a long judgment was delivered by the District Judge, the result of which in my opinion is most unfortunate. He should have considered whether there should be a prosecution on the lines laid down in

1. (1922) 43 M.L.J. 375: I.L.R. 45 Mad. 928 (F.B.).

Kuppuswamy Chettiar v. Subbaraya Chettiar.

Muniswamy Mudaliar v. *Rajaratnam Pillai*[1] and said very little regarding the merits and nothing about the expected result. He described the man whose prosecution he was directing as a 'self-confessed criminal who on his own admission is responsible for contriving and perpetrating a serious fraud on the Court.' This entirely prejudices the case. He then goes on to use the following words "I have no doubt that that matter"—referring to a contention of the petitioner—"will be taken into consideration by the trial Court in awarding punishment in the case." This presumes a conviction. He does not consider at all the long delay in this case in making the complaint. In my view this case has reached a stage when it is not definitely in the public interest that a prosecution should proceed. This is a good example of the maxim now so well-known that not only should justice be done but should be seen to be done and I consider for me to allow a case to proceed in which the District Judge has referred to a man to be prosecuted as a self-confessed criminal who had contrived and perpetrated a serious fraud on the Court would not be in accordance with the last of the two conditions in the maxim. There might be such a case but this does not seem to me to be that case. It does seem unquestioned that the petitioner admitted an offence against the Court which he endeavoured to put right at the earliest possible moment. That was in 1937. On the face of it it does not seem to be necessarily a very grave case but it has been magnified and embellished with extravagant epithets in a manner wholly out of proportion to its importance and I consider that now it is not in the public interests that the prosecution should proceed in this atmosphere of pre-trial comment. I shall therefore allow the appeal and the lower Court is directed to withdraw the complaint. There will be no order with regard to costs.

In this case the question has arisen as to whether notice should go to the Public Prosecutor or Government Pleader in appeals such as this. The decision in *Kumaravel* v. *Shanmugha*[2], makes it clear that this is a civil matter from the point of view of whether the Code of Civil Procedure applies. I think however that owing to the nature of the proceedings it is desirable that notice should go to the Public Prosecutor rather than

1. (1922) 43 M.L.J. 375: I.L.R. 45 Mad. 928 (F.B.).
2. (1940) 1 M.L.J. 719: I.L.R. 1940 Mad. 762 (F.B.).

Kuppuswamy Chettiar v. Subbaraya Chettiar.

to the Government Pleader as he is the appropriate Law Officer to deal with questions relating to prosecutions, *e.g.*, perjury and similar offences. I may add that I think this case has shown how necessary it is that notice should go to a Law Officer who can bring an impartial eye to bear upon this question and thereby assist the Court. The respondent has pressed most strongly for this prosecution to continue although I do not suggest that his learned counsel went further than he properly could. His instructions are the instructions of the lay client. But the Public Prosecutor suggests the view which I have now held, namely, that having regard to all the circumstances and especially the manner in which this case was dealt with in the lower Court it is not in the interests of justice but rather contrary to them that this prosecution should proceed.

K. S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE HAPPELL.

Oorakarai Seetharama Chettiar .. *Appellant** (*Appellant*)

v.

Sheik Abdul Rahiman Sahib .. *Respondent* (*1st Respondent*).

Seetharama Chettiar v. Sheik Abdul Rahiman Sahib.

Limitation Act (*IX of* 1908), *Art.* 182 (2)—*'Appeal'—Meaning.*

In an appeal arising out of an application filed in 1935 to execute a decree of 1929, on the question whether the application was barred by limitation, it was contended by the decree-holder that his application was not barred as it was within three years from 1933 when an 'appeal' against an order dismissing the judgment-debtor's application of 1931 to record satisfaction of the decree was finally dismissed by the appellate Court.

Held, that the word 'appeal' in Art. 182 (2) of the Limitation Act does not mean any appeal the result of which may affect, not the decree itself but only the decree-holder's right to execute it at a particular time and in particular circumstances, and that the application for execution was therefore barred.

Sriramachandra v, *Venkateswara*, (1938) 2 M.L.J. 1048: I.L.R. 1939 Mad. 252 and *Nagendranath De* v. *Sureshchandra De*, (1932) 63 M.L.J. 329: L.R. 59 I.A. 283: I.L.R. 60 Cal. 1 (P.C.), distinguished.

(1940) 2 M.L.J. 371, affirmed.

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* L. P. A. No. 22 of 1940. 27th February, 1941.

Seetharama Chettiar v. Sheik Abdul Rahiman Sahib.

Appeal under Clause 15 of the Letters Patent against the judgment of the Hon'ble Mr. Justice King dated the 12th April, 1940, and passed in A. A. A. O. No. 141 of 1938, (1940) (2 M. L. J. 371) preferred against the order of the District Court of Salem in A. S. No. 148 of 1937, (R. E. P. No. 282 of 1936 in O. S. No. 766 of 1927 District Munsif's Court, Salem).

K. Rajah Aiyar for Appellant.

P. S. Narayanaswamy Aiyar for Respondent.

The judgment of the Court was delivered by

Leach C. J.

The Chief Justice.—The Letters Patent Appeal involves the question of the effect of the judgment of this Court in *Sriramachanara* v. *Venkateswara*[1]. In that case a Division Bench consisting of King and Krishnaswami Aiyangar, JJ., held that the word 'appeal' in the third column of Art. 182 of the Limitation Act means 'an appeal in the suit which is likely to affect the decree sought to be executed', and not merely an appeal against the actual decree or order sought to be executed. In other words, the word 'appeal' does not necessarily mean an appeal from the decree or order referred to in the first column of the Article. In the present case the facts are very different from the facts in *Sriramachandra* v. *Venkateswara*[1] and King, J., whose judgment is now under appeal, has held that the decision in *Sriramachandra* v. *Venkateswara*[1] does not govern the present case.

In *Sriramachandra* v. *Venkateswara*[1] there was an appeal against an order refusing to set aside an *ex parte* decree and the Court held that the period of three years prescribed by Art. 182 ran from the 20th October, 1932, the date of the appellate decree of the High Court, and not from the 5th March, 1930, the date of the *ex parte* decree. In the case now before the Court a preliminary mortgage decree was passed on the 3rd April, 1928, in favour of the appellant and the final decree followed on the 9th November, 1929. On the 24th November, 1931, the judgment-debtors applied for an order directing the entering up of satisfaction of the decree. The appellant denied that the decree had been satisfied and on the 28th November, 1931, he applied for the sale of the mortgage property, but his application was dismissed on the 2nd April, 1932. On the 30th June, 1932, the Court

1. (1938) 2 M.L.J. 1048: I.L.R. 1939 Mad. 252.

Seetharama Chettiar v. Sheik Abdul Rahiman Sahib.

Leach, C.J.

also dismissed the application by the judgment-debtors for an order directing satisfaction to be entered up. The judgment-debtors appealed against the order dismissing their application but were again unsuccessful. The decree of the appellate Court was passed on the 20th March, 1933. On the 21st August, 1935, the appellant again applied for the sale of the mortgage property in pursuance of the final decree obtained by him on the 9th November, 1929. This application was opposed on the ground that the decree had become barred by limitation inasmuch as more than three years had elapsed from the dismissal of the appellant's previous application. The appellant's case was that the period of limitation commenced to run against him only from the 20th March, 1933, when the appeal filed by the judgment-debtors against the order on their application was decided. The District Munsif of Salem, in whose Court the mortgage decree was passed, decided against the appellant and his judgment was upheld by the District Judge of Salem on appeal. King, J., on second appeal agreed that the Courts below were right.

The argument advanced on behalf of the appellant is that the application filed by the judgment-debtors for an order directing the entering up of satisfaction was an application which was likely to affect the decree, because if it were granted it would mean that there will be no decree to execute. Therefore the appellant was entitled to wait until the application had been finally decided before taking any further steps to bring the mortgage property to sale.

In addition to referring to the judgment in *Sriramachandra* v. *Venkateswara*[1], the learned advocate for the appellant has laid great stress on a passage in the judgment of the Privy Council in *Nagendranath De* v. *Sureshchandra De*[2], where it is said that so long as there is any question *sub judice* between any of the parties, those affected shall not be compelled to pursue the so often thorny path of execution, which, if the final result is against them, may lead to no advantage. As King, J., has remarked in the judgment under appeal the appellant's argument is very plausible, but the learned Judge was not prepared to extend the judgment in *Sriramachandra* v. *Venkateswara*[1],

1. (1938) 2 M.L.J. 1048: I.L.R. 1939 Mad. 252.
2. (1932) 63 M.L.J. 329: L.R. 59 I.A. 283: I.L.R. 60 Cal. 1. (P.C.).

Seetharama Chettiar v. Sheik Abdul Rahiman Sahib.

Leach, C. J.

which he himself delivered to the present case and refused to regard the dictum of the Privy Council in *Nagendranath De* v. *Sureshchandra De*[1], as having application here. We consider that he was right. While the word 'affect' is very wide in its scope, in using it in *Sriramachandra* v. *Venkateswara*[2], the learned Judges were not intending to give it the wide application which the appellant would have. In the present case King, J., has clearly indicated this. In *Sriramachandra* v. *Venkateswara*[2], if the appeal against the order refusing to set aside the *ex parte* decree had been successful, the *ex parte* decree would have been cancelled. In the present case the granting of the judgment-debtors' application for an order directing the entering up of satisfaction would not have cancelled the decree. The decree would still stand and govern the rights of the parties. The only effect of the payment of the decretal amount would be that the decree could no longer be available to support an application for execution. That is the distinction between *Sriramachandra* v. *Venkateswara*[2], and the present case. In *Nagendranath De* v. *Sureshchandra De*[1], the Privy Council were concerned with the question whether any application by a party to an appellate Court to set aside or revise a decree or order of a Subordinate Court was an appeal within the meaning of Art. 182 (2) and they held that it was. There, if the application had been successful the decree would have been set aside or revised.

We agree with King, J., that the judgment in *Sriramachandra* v. *Venkateswara*[2], cannot be given the meaning which the appellant would have. For these reasons the appeal will be dismissed with costs.

K. S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE MOCKETT.

C. Velayudham Pillai .. *Petitioner* (Respondent —1st Defendant)*

v.

S. C. Subramania Pillai .. *Respondent (Petitioner —Plaintiff).*

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1. (1932) 63 M.L.J. 329: L.R. 59 I.A. 283: I.L.R. 60 Cal. 1. (P.C.).
2. (1938) 2 M.L.J. 1048: I.L.R. 1939 Mad 252.

* C. R. P. No. 1696 of 1940. 30th January, 1941.

Vela-yudham Pillai v. Subramania Pillai.

Civil Procedure Code (V of 1908), O. 11, r. 14—Certified copies of income-tax returns—Whether a party can be compelled to obtain and produce at the instance of the opposite party—Income-tax Act, S. 54—Scope and effect.

A plaintiff applied to the Court under O. 11, r. 14, Civil Procedure Code, for an order directing the defendant to obtain certified copies of his income-tax returns and certain other documents and to produce them, at the plaintiff's cost

Held, that the defendant cannot be compelled to produce documents not in existence which, therefore could not be said to be in his 'possession or power'.

Held further, that such discretionary orders under O. 11, r. 14 could not be passed except under very special circumstances and that in view of S. 54 of the Income-tax Act, such documents must be treated as confidential and the Court should not compel the assessee to apply for copies and produce them.

Petition under S. 115 of Act V of 1908 praying that the High Court will be pleased to revise the order of the Court of the District Munsif of Ariyalur dated the 3rd October, 1940, and made in I. A. No. 839 of 1940 in O. S. No. 584 of 1939,

K. S. Desikan and *K. Raman* for Petitioner.

S. Panchapagesa Sastri and *P. S. Ramachandran* for Respondent.

The Court delivered the following

JUDGMENT.—This is a civil revision petition to revise the order of the learned District Munsif of Ariyalur. The lower Court on an application by the respondent has ordered the petitioner, who is the defendant in the suit, to apply for a certified copy of his income-tax returns and profit and loss statements with particulars submitted by him to the Income-tax Officer, First Circle, Trichinopoly, over a period of several years. He is to produce them at the plaintiff's cost. It will be observed that the application was not in the precise terms of O. 11, r. 14 Civil Procedure Code, to produce documents in the defendant's possession or power relating to the matter in suit but to obtain and produce copies of these documents. The learned District Munsif has made the order because he considers that a new situation has been created by the decision of a Full Bench of this Court reported in *Rama Rao* v. *Venkataramayya*[1]. What that case decided was that certified copies of profit and loss statements and statements showing details of net income filed by the assessee in support of his income-tax return were admissible in evidence. It appears from the judgment that under

1. (1940) 2 M.L.J. 257: I.L.R. 1940 Mad. 969 (F.B.).

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the rules in the income-tax department as a matter of practice an assessee is permitted to have a copy of his income-tax returns. I do not understand that the learned Judges decided anything more than that when a copy had been given to the assessee, it was admissible in evidence. It has been argued before me that the effect of that decision is to make it compulsory for an assessee to obtain and produce to the opposite party in a suit copies of the returns if the opposite party desires to inspect them. Now, in the first place it must be observed that O. 11, r. 14, corresponding to O. 31, r. 14, of the English Rules of the Supreme Court, deals with existing documents and documents which at the time of the application are in the possession or power of the person against whom the order is sought to be made. There is no record of any case where a party has been called upon not only to produce but to have brought into existence a copy of a document, and in this particular case it must be remembered that the document is a highly confidential document protected by S. 54 of the Income-tax Act. That Act prohibits a public servant from making any disclosures with regard to such income-tax returns and it says that no Court shall, with certain exceptions, be entitled to require any public servant to produce before it any such return, accounts, documents or record or any part of any such record or to give evidence before it in respect thereof. None of the exceptions which are in public interests have any relation to litigation between ordinary citizens and there is no provision for the production of documents for the benefit of individual litigants. I think that it is an answer to this application to say that first of all there is no document in existence and therefore it cannot be in the power of the defendant and secondly that the Court is prohibited from ordering a defendant to produce his original income-tax returns equally as it cannot order the Income-tax Officers themselves to produce them. To direct that a litigant should produce a certified copy of his return would render S. 54 of the Income-tax Act in some respects a dead letter. It must be remembered that it is nothing more than a rule of practice by which the income-tax authorities allow assessees to have copies of these documents and there is nothing before me to show that that privilege might not be withdrawn. But, generally speaking, this application is entirely contrary to authority. Such an application was refused in a Scotch case reported in *Shaw* v.

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Kay[1]. There are other cases based on other statutes dealing with documents of which *Rowell* v. *Balt*[2] and *Ankin* v. *London and North Eastern Railway Company*[3], are examples, showing that when a statute prohibits the production of a document, that prohibition is absolute and inconvenience of litigants is irrelevant. Further, an order under O. 11, r. 14 is a discretionary order and in the words of Bowen, L.J., in *Arnott* v. *Hayes*[4], this power should be exercised with great caution. I do not think that this aspect of it was present in the mind of the lower Court. Generally I think this order is contrary to law for the reasons which I have given. I would repeat that it seems to go to the root of the whole principle that these income-tax returns are confidential documents which not even the authorities themselves may disclose.

The civil revision petition is allowed with costs and the order of the lower Court is set aside.

K. S. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

J. Austen Byers, Esq .. *Petitioner** (*Defendant*)

v.

The Municipal Council, Trichinopoly by its executive authority, the Commissioner, Puthur, Trichinopoly.. *Respondent* (*Plaintiff*).

Austen Byers v. Municipal Council, Trichinopoly.

Madras District Municipalities Act (V of 1920), S. 93 (a) (1)—Government servant holding an appointment within a Municipality—Residence outside—Taxable income for half-year—Income from appointment alone taxable during the period for which he held the post within the Municipality.

Where a Government servant worked for three months and 2 days within a District Municipality but resided during the period outside the Municipality, and the Municipality sued him claiming that he was taxable not only on the pay of his appointment during the period for which he held the post within the Municipality but also on his professional income for the rest of the half-year, that is, the periods of his absence from the Municipality,

Held, that the person was taxable only under sub-cl. (*a*) (1) by virtue of having held an appointment within the Municipality; that appointment within the Municipality was the sole source of income in respect of

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1. (1904) 5 Tax Cases 74.
2. 1938 A.C. 101.
3. (1930) 1 K.B. 527.
4. (1887) 36 Ch.D. 731 at 738.

*C. R. P. No. 1574 of 1939. 19th April, 1940.

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which tax was leviable and in calculating his income for the half-year, only the income from the taxable source should be taken into consideration.

In re *Hilton Brown*, A.I.R. 1938 Mad. 462, distinguished.

Petition under S. 25 of Act IX of 1887 praying that the High Court will be pleased to revise the decree of the Court of Small Causes at Trichinopoly in S. C. S. No. 1089 of 1938.

A. V. Narayanaswami Aiyar for Petitioner.

B. Sitarama Rao for Respondent.

The Court delivered the following

JUDGMENT.—This petition raises a question of liability to profession tax under S. 93 of the Madras District Municipalities Act. The petitioner was the defendant in the lower Court and there is no dispute about the facts.

From 1st April, 1935, to 14th April, 1935, petitioner held the appointment of District and Sessions Judge, Trichinopoly. On 15th April, 1935, he ceased to hold that appointment having been granted leave with permission to be absent from duty during the ensuing summer vacation. He spent this period of leave and vacation outside India. On 22nd June, 1935, he was re-appointed District and Sessions Judge, Trichinopoly, and held that appointment up to 9th September, 1935, when he again took leave and his connection with Trichinopoly ceased. The total period of his duty as District and Sessions Judge, Trichinopoly, during the half-year with which we are concerned was thus 3 months and 2 days and it is common ground that during this period, though he worked inside the Municipality, he resided outside the Municipality. The petitioner has paid the profession tax which would be due from him on the income earned by the exercise of his profession during this period of 3 months and 2 days. The Municipality however filed a small cause suit claiming that he was taxable not only on the pay of his appointment during the period for which he held an appointment within the Municipality but also on his professional income for rest of the half-year, that is, the periods of his absence from Trichinopoly.

S. 93 of the Madras District Municipalities Act makes a person liable for profession tax if:

(a) he exercises a profession, art or calling or transacts business or holds any appointment, public or private;

(i) within the Municipality for not less than 60 days in the aggregate, or

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(ii) without the Municipality but who resides in the Municipality for not less than sixty days in the aggregate;

(*b*) resides in the Municipality for not less than sixty days in the aggregate and is in receipt of any pension or income from investments.

Such a person is required to pay a half-yearly tax assessed in accordance with the rules in Schedule IV. R. 16, of Schedule IV divides taxable persons into twelve classes according to the amount of their half-yearly income and prescribes the appropriate taxes. Sub-S. (2) of S. 93 prescribes that a person shall be chargeable under the class appropriate to his aggregate income from all the sources specified in sub-S. (1) as being liable to the tax. Now it is possible to read this clause in several different ways. It could be given a very wide interpretation and made to mean that any one who became taxable under any of the qualifications in sub-clauses (1) (*a*) and (*b*) would be chargeable in respect of any income derived from any of the sources therein set forth. Under this interpretation a man who qualified for the tax merely by holding an appointment for sixty days within the Municipality where he did not reside could be made to pay tax on the income which is expressly made taxable only on the basis of residence. That is to say, he could be made to pay tax on his income from investments or his pension or on the income from an appointment held outside the Municipality. I do not think that this is the correct interpretation of this clause and it has not been seriously contended before me that such a wide meaning should be given to it. Another possible interpretation is that when a person is taxable under either the first or second parts of sub-cl. (*a*) he becomes chargeable in respect of income during the half-year from any profession or appointment wherever exercised. This is the interpretation for which the learned Government Pleader has contended. It involves the reading of the first part of sub-clause (*a*) as dealing only with the sources of income and treating the qualifying words in parts (*i*) and (*ii*) as having relation only to the conditions giving rise to taxability. It seems to me that this method of construction involves a strain on the language of the section. The first part of sub-section (*a*) is really one single sentence—a person exercising a profession or holding an appointment within the Municipality for not less than sixty days in the aggregate. The second part is really another sentence dealing with those who exercise a profession or hold an appointment without the Municipality but

reside in the Municipality for not less than sixty days. With reference to the first class of persons the source of income is surely not the appointment whatever and wherever it may be but the appointment within the Municipality. With reference to the second class of persons the source of income is clearly the appointment or profession outside the Municipality which is made taxable by the qualification of residence within the Municipality. It seems to me that the intention of sub-cl. (2) of S. 93 is to make a person chargeable to profession tax under a class appropriate to his aggregate income from any source of income with reference to which he can be deemed to be taxable having regard to the terms of sub-cls. (*a*) and (*b*) of cl. (1). That is to say, if a person is taxable by reason of his residence, then he comes both under sub-cl. (*a*) (*ii*) and under sub-cl. (*b*) and he would be taxable both in respect of any profession or appointment exercised outside the Municipality and also on any pension or income from investments. If on the other hand a man becomes taxable only by reason of the practice of a profession or the holding of an appointment within the Municipality, then the only source in respect of which his income can logically be calculated is the profession or appointment within the Municipality which brings him under the Act.

Not being a resident within the Municipality, he cannot be taxable on income from sources which are only taxed on the basis of residence. There is no precise authority on the subject. My attention has, however, been drawn to the decision in In re *Hilton Brown*[1], which on the facts bears a superficial resemblance to the present case. That was a case of a Government servant who spent a portion of the half-year at Vellore where he was the Collector. For rest of the half-year he was on leave outside India. The report does not precisely state that he resided in Vellore where he held his appointment. But there is nothing stated to the contrary and one may infer that he lived, as most people do, in the town where he worked. On these facts it was held that he was taxable on the total income from his appointment during the half-year. Assuming that he lived within the Municipality it seems to me that this decision is in accordance with the view which I have suggested; for he would be taxable under sub-

1. A.I.R. 1938 Mad. 462.

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cl. (*a*) (*ii*) of cl. (1) as a person residing in the Municipality who is taxable in respect of extra Municipal income and he would also be taxable as a person holding an appointment within the Municipality for a portion of the half-year. These two categories of liability together cover the whole of the half-year for which the tax was claimed.

The present case however presents different facts. The petitioner is taxable to my mind only under sub-cl. (*a*) (*i*) by virtue of having held an appointment within the Municipality; that appointment within the Municipality is the sole source of income in respect of which tax is leviable and in calculating his income for the half-year, I am of opinion that only the income from the taxable source should be taken into consideration.

In this view I allow the petition and dismiss the suit with costs throughout.

K.C. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

Pudikutty Unneeri .. *Appellant* (Plaintiff)*

v.

The Municipal Council, Calicut .. *Respondent (Defendant).*

Pudikutty Unneeri v. Municipal Council, Calicut.

District Municipalities Act (V of 1920), Ss. 167, 168 and 183—House—Construction of—Plan—Licence in terms of plan subject to street alignment rule—Pial within street alignment 6 feet contrary to plan—If infringement of licence and S. 167—If owner entitled to compensation for having to build in the restricted area—S. 168, construction of.

Where a licence was granted for putting up a building according to the plan submitted to the Municipality by the owner, and a note was added thereto that the street alignment of 6 feet under S. 167 of the District Municipalities Act should be strictly observed, and the owner after constructing the building according to the plan added a pial offending S. 167, the Municipality can order demolition of the pial

A pial is part of a building and therefore it is a breach of the licence to build a pial. S. 183 deals with verandahs in the nature of balconies which project over a street and not with pials which do not overhang a street.

S. 168 applies to a person who is reconstructing his house and who because of an order of the Municipality has to keep his house out of the street alignment.

Appeal against the decree of the District Court of South Malabar in Appeal Suit No. 4 of 1937, preferred against the

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* S. A. No. 163 of 1939. 13th December, 1940.

Pudikutty Unneeri v. Municipal Council, Calicut.

decree of the Court of the District Munsif of Calicut in O. S. No. 119 of 1936.

C. K. Viswanatha Aiyar for Appellant.

K. Kuttikrishna Menon for Respondent.

The Court delivered the following

JUDGMENT—The appellant had an old house occupying the site *A, B, D, C* in the plan filed by him. That house fell into a state of disrepair and the Commissioner of the Calicut Municipality ordered its demolition. The appellant wished to reconstruct the house and he submitted a plan proposing to build the house on *E, F, D, G.* That plan was approved and a licence (Ex. D) was issued in which a note was added "The street alignment of 6 feet—Mooriet Road and the Coast Road on the west should be strictly observed." This note was added to remind the appellant of the provisions of S. 167 of the District Municipalities Act to the effect that no person should construct any portion of any building within a street alignment as defined under S. 166. The findings of the Court below are that after the building was constructed in accordance with this plan, the appellant added a pial on the remaining area of his site, that is, the land lying between *G, E, F, D* and *A, B, D, C*. When the Municipality discovered this construction they ordered him to demolish it and threatened him that if he did not do so they would demolish it themselves and charge him with the cost. The plaintiff thereupon brought the present suit for a permanent injunction to restrain the defendant Calicut Municipality from demolishing this pial. The suit was dismissed. The appellant preferred an appeal to the District Court which was also dismissed. Hence this second appeal by the plaintiff.

There is no doubt in my mind that a pial does form part of a building and that therefore the appellant commiited a breach of the licence and also failed to comply with the provisions of S. 167. The learned advocate for the appellant argues that S. 183 deals with the grant of licences for verandahs and not S. 167; but the verandahs referred to in S. 183 are of the nature of balconies, which project over a street. That section does not relate to pials, and the appellant's pial does not overhang the street. It is constructed on the plaintiff's own property. The *Chairman, Municipal Council, Srirangam* v. *Subba Pandithar*[1], upon which reliance has been placed by the appel-

1. (1913) 25 M.L.J. 297: I.L.R. 38 Mad. 456.

Pudikutty Unneeri v. Municipal Council, Calicut.

lant, merely says that where a person holding land has encroached upon the street and has had possession of it for over the statutory period he acquired a right to the encroached area by prescription; so that the land becomes his, and that he can therefore do what he likes with the land. I do not see how that decision helps the appellant in any way.

The appellant next contends that he is entitled to compensation under S. 168. S. 168 does apply to a person who is reconstructing his house and who, because of an order of the Municipality, has to keep his house out of the street alignment. Such a person becomes entitled under this section to be compensated for his compliance with the Municipality's order. Unfortunately for the appellant, however, the plan submitted by him and his application for a licence do not show that he restricted his building on account of some order of the Municipality; but it is probably true, as the appellant states, that it was because the Municipal Surveyor told him that he must build within the restricted area so as to allow a six-feet margin from the street boundary that he submitted the plan he did. This point was not however raised in either of the Courts below—nor is it to be found in the grounds of appeal. In the absence of pleadings and evidence, it cannot be held that the plaintiff is entitled to compensation. The appellant cannot therefore be given any remedy in this suit; but the Municipality should, in my opinion, have given him compensation, not for demolishing his pial, but for having to build his house on the restricted area.

The appeal is dismissed with costs.

S. V. V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT—MR. JUSTICE WADSWORTH.

Muthuswami Chettiar .. *Petitioner* (Petitioner)*

v.

Narayanaswami Chettiar .. *Respondent (Respondent—Plaintiff).*

Muthuswami Chettiar v. Narayanaswami Chettiar.

Mortgage—Petitioner claiming half-share in the mortgage security—Adverse to plaintiff's claim in suit—Whether petitioner to be made a party—O. 34, r. 1, Civil Procedure Code (V of 1908) applicable.

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* C. R. P. No. 1001 of 1937. 18th November, 1940.

Muthuswami Chettiar *v.* Narayanaswami Chettiar.

Where the plaintiff brought a suit on a mortgage ignoring the claim of the present petitioner to a half-share therein and the application of the present petitioner to be brought on record as a party to the suit was refused,

Held, that although his claim was adverse to that of the plaintiff, it was one which ought to have been decided before a decree was given in the mortgage suit. O. 34, r. 1, Civil Procedure Code requires that all persons having an interest in the mortgage security should be joined as parties to any suit relating to the security.

Petition under S. 115 of Act V of 1908 and S. 224 of the Government of India Act praying that the High Court will be pleased to revise the order of the Court of the District Munsif of Tindivanam dated 12th February, 1937, and made in I. A. No. 45 of 1937 in O. S. No. 571 of 1936.

N. Muthuswami Aiyar and *S. Srinivasan* for Petitioner.

M. L. Nayak, M. R. Venkataraman and *T.K. Rajagopalan* for Respondent.

The Court delivered the following

JUDGMENT.—This petition arises out of an order dismissing an application under O. 1, r. 10 of the Code of Civil Procedure to add the petitioner as party to a mortgage suit. The mortgagee was a deceased person whose property was claimed by an alleged adopted son. The present petitioner challenged the validity of the adoption and claimed himself to be entitled to the properties of the deceased mortgagee. There was a suit to declare that the adoption was invalid. This suit was compromised in 1934, the result being that the right of the present petitioner was recognised as to one half of the properties and the right of the adopted son to the other half. There was also a subsequent partition suit to divide the properties as a result of which the present mortgage was to be shared equally between the two. However, in 1936 the adopted son purported to assign the suit mortgage to the plaintiff as if he was solely entitled thereto. The plaintiff brought a suit on the mortgage ignoring the claim of the present petitioner to a half-share therein. The suit was filed in 1936, and while the suit was pending the present petitioner applied to be brought on record as a party to the suit entitled to a half-share in the mortgage. The learned District Munsif refused to complicate the suit by adding a person who claimed adversely to the plaintiff and dismissed the application. It seems to me that the learned District Munsif has incorrectly appreciated the legal position.

Muthu-swami Chettiar v. Narayana-swami Chettiar.

Granted that it is ordinarily undesirable to implicate in a mortgage suit persons claiming adversely to either the mortgagor or the mortgagee, that is not really the position here. Present petitioner's claim is not in any way in derogation of the rights of the mortgagee or the mortgagor. He claims that he is, as to a half-share, the mortgagee himself and that the plaintiff is entitled only to the other half of the mortgage right by virtue of his assignment. Although this is a claim adverse to the plaintiff it is one which in my opinion ought to have been decided before a decree was given in the mortgage suit; for, otherwise, the result would be that the mortgagor would be liable to another suit on the same mortgage and the decree in the plaintiff's suit would not enable him to satisfy the claim under the mortgage by payment of the amount due to the plaintiff. O. 34, r. 1, requires that all persons having an interest in the mortgage security shall be joined as parties to any suit relating to the security. If the allegations in the petition are correct the petitioner is entitled to half of the mortgage security and he is a necessary party to the suit.

It is objected that the suit has now reached the stage of a final decree. That is unfortunate. But it is not due to the fault of the petitioner, who filed his application in good time and challenged the rejection of that application in the only way open to him by filing the present revision petition. It is a pity that the revision petition has been pending so long in this Court. It seems to me, however, that the decree which the plaintiff has obtained is one which should not, either in the interests of the present petitioner or in the interests of the mortgagor, be allowed to enure solely for the benefit of the plaintiff.

In the result, therefore, I allow the petition with costs and direct that the petitioner be impleaded as a party before the trial Court which will go into the truth of the allegations in the petition, and if they are established, will amend the decree so as to make the petitioner entitled to half the amount payable under the decree.

K. C. *Petition allowed*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE KRISHNASWAMI AIYANGAR.

V. Ramaswami Aiyar and another .. *Appellants** (*Nil and Appellant*)

v.

Veerarayan Raja *alias* Kuttunni, the present Eralpad Raja and another *Respondents* (*Respondents 3 and 2*).

Ramaswami Aiyar v. Veerarayan Raja.

Practice—Institution of suit—Presentation of plaint to Court having jurisdiction—Subsequent finding as to value of subject-matter — Plaint returned and represented to different Court—Date of institution of suit.

The presentation of a plaint to a Court which has no jurisdiction to try the suit cannot be said to be the institution of the suit, even though the plaint has been accepted as being in order and registered. But when a plaint is presented to a Court having jurisdiction and that Court accepts the plaint as being in order it must be held that the suit has been instituted. Because at some later stage, as the result of a finding on the value of the subject-matter of the suit, it is found that the plaint should have been presented to another Court having jurisdiction and that the plaint is returned for presentation in that Court, it does not mean that the suit has not been instituted. And when a plaint has been so returned and re-presented to that Court having jurisdiction, the date of the institution of the suit is the date on which the plaint was originally filed and not the date on which it was re-presented.

Hirachand Succaram v. *G. I. P. Railway Co., Bombay*, (1928) I.L.R. 52 Bom. 548, distinguished.

Appeal under Cl. 15 of the Letters Patent against the decree and judgment of the Hon'ble Mr. Justice King dated the 23rd March, 1938, in S. A. No. 264 of 1936 preferred against the decree of the Court of the Subordinate Judge of Ottapalam in A. S. No. 2 of 1935 preferred against the decree of the Court of the District Munsif of Chowghat in R. I. A. No. 372 of 1933 in O. S. No. 308 of 1932.

P. Govinda Menon for Appellant.

Respondent not represented.

The judgment of the Court was delivered by

Leach, C.J.

The Chief Justice.—The second appellant is the karnavan of a Malabar tarwad.

On the 8th January, 1906, the jenmi, who is now represented by the first respondent, executed in favour of the tarwad of the appellant a kanom mortgage in respect of 58 parcels of agricultural land. On the 6th January, 1925, the jenmi

* L. P. A. No. 71 of 1938. 12th November, 1940.

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executed a melcharth in favour of the second respondent, who on the 4th February, 1929, filed a suit in the Court of the Subordinate Judge of Calicut to enforce the redemption of the kanom. There were 136 defendants, the karnavan, 22 other members of the tarwad and 113 tenants. The contesting defendants pleaded that the Subordinate Court had no jurisdiction because the plaintiff had overvalued the property and that on a true valuation it should be filed in the Court of the District Munsif of Chowghat. After inquiry the Subordinate Judge held that the allegation of overvaluation was well founded and by an order dated the 4th March, 1930, directed that the plaint be returned to the second respondent for presentation to the District Munsif's Court. The plaintiff appealed to the District Judge of South Malabar, who came to the conclusion that the suit had not been overvalued and accordingly directed the Subordinate Judge to hear and decide it. The contesting defendants then appealed to this Court, and Jackson, J., who heard this appeal came to the conclusion that the District Judge had erred and that the order of the Subordinate Judge should be restored. In pursuance of the order of the learned Judge the second respondent applied for the return of the plaint and it was handed to him by the Subordinate Judge on the 31st March, 1932. On the 11th August, 1932, the second respondent presented the plaint to the District Munsif.

In the meantime the Malabar Tenancy Act, 1929 had been passed and came into force on the 1st December, 1930, but in S. 1 (3) there is a proviso in these terms:

"Provided that in all suits for eviction instituted after the 30th July, 1929, and pending in the Court of first instance on the date when the Act comes into force, which would have been governed by the provisions of this Act had it been in force at the time of their institution, the rights and obligations of the parties concerned shall be regulated by the provisions of this Act."

By virtue of Ss. 22 and 23 of the Act a kanomdar is now in a position to apply for a renewal of his kanom.

On the 29th March, 1933, the appellant as the karnavan of the tarwad in whose favour the kanom of the 8th January, 1906, had been executed applied to the District Munsif of Chowghat for the renewal of the kanom. The second respondent objected. He relied on the proviso in S. 1 (3) of the Act, as the suit instituted by him for the redemption of the kanom was in effect a suit for eviction. The validity of this

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Leach, C. J.

objection depends on the date on which the suit was 'instituted'. If it was instituted on the 4th February, 1929, the date on which the plaint was presented to the Subordinate Judge, the appellant was not entitled to apply for a renewal of the kanom, but if the date of institution is the 11th August, 1932, when the plaint was presented to the District Munsif of Chowghat the proviso will apply and the appellant's application for a renewal of the kanom will lie.

The District Munsif held that the suit must be deemed to have been filed on the date the plaint was presented to the Subordinate Judge of Calicut, namely, the 4th February, 1929, and accordingly he dismissed the application of the appellant. The appellant appealed to the Subordinate Judge of Ottapalam, who agreed with the District Munsif. The appellant then appealed to this Court, but again without success. The appeal was heard by King, J., who agreed with the Subordinate Judge's conclusion but on grounds somewhat different from those stated by the Subordinate Judge. The learned Judge having given a certificate under Cl. 15 of the Letters Patent the present appeal has been filed against his decision.

If it had been the case that the Subordinate Judge of Calicut had no jurisdiction to entertain the second respondent's suit we should have no hesitation in accepting the contention of the appellant that the date of the institution of the suit was the 11th August, 1932, when the District Munsif of Chowghat became seised with the matter. The presentation of the plaint to a Court which has no jurisdiction to try the suit cannot be said to be the institution of the suit, even though the plaint has been accepted as being in order and registered. Before a suit can be deemed to be 'instituted' the plaint must be presented to a Court having jurisdiction. But notwithstanding that here the plaint should have been filed in the Court of the District Munsif by reason of S. 15 of the Code of Civil Procedure, which says that every suit shall be instituted in the lowest Court competent to try it, the Subordinate Judge had in fact jurisdiction to try it and he received his jurisdiction under the provisions of S. 12 of the Madras Civil Courts Act. That section says that the jurisdiction of a District Judge or a Subordinate Judge extends, subject to the rules contained in the Code of Civil Procedure, to all original suits and proceedings of a civil nature. There is nothing in the rules of the Code of

Ramaswami Aiyar v. Veeranayan Raja.

Leach, C. J.

Civil Procedure which takes away the jurisdiction conferred by S. 12 of the Madras Civil Courts Act. If no objection to the valuation had been taken the Subordinate Judge would have heard and decided the suit and the decree passed by him would have had full validity, subject, of course to an appeal.

Mr. Govinda Menon has very properly conceded that the Subordinate Judge had jurisdiction, but he has said that inasmuch as the plaint should have been presented to the lowest Court having jurisdiction the suit must be deemed to have been instituted when it was presented to the District Munsif. We cannot accept this argument, as we have already indicated. When a plaint is presented to a Court having jurisdiction and that Court accepts the plaint as being in order it must be held that the suit has been instituted. Because at some later stage, as the result of a finding of fact on the question of the value of the subject-matter of the suit, it is found that the plaint should have been presented to another Court having jurisdiction and that the plaint is returned for presentation in that Court, it does not mean that the suit has not been instituted. When a plaint has been presented to a Court having jurisdiction a transfer of the case to another forum cannot mean the cancellation of the institution.

Mr. Govinda Menon has relied on the decision of the Bombay High Court in *Hirachand Succaram* v. *G. I. P. Railway Co., Bombay*[1], but we fail to see what application the judgment in that case has here. On the 10th March, 1925 and on the 29th June, 1925, two suits were instituted in the Court of the First Class Subordinate Judge at Sholapur against the Great Indian Peninsular Railway. At that time the Railway was controlled by a limited liability Company, but on the 1st July, 1925, it came under State control and it was necessary to add as a defendant to the suits the Secretary of State for India in Council. Up to the happening of this event the Subordinate Judge had jurisdiction to try the suits, but inasmuch as they had to be converted into suits against the Secretary of State for India in Council his jurisdiction ceased and it was necessary for the plaintiff to take back the plaints and present them to the District Court. Before the District Judge the question was raised on behalf of the Secretary of State whether

1. (1928) I.L.R. 52 Bom. 548.

the suits were bad for want of notice under S. 80 of the Code of Civil Procedure and the date of the institution of the suits became a material factor. The Bombay High Court held that the date of the suits must be taken to be the date on which the plaints were presented to the District Court. The difference between the Bombay suits and the suit now before us is that in the Bombay suits the Subordinate Judge had no jurisdiction to try them, but in the case before us the Subordinate Judge had jurisdiction, although after the suit had been instituted it was found that another Court also had jurisdiction and that the Code of Civil Procedure required the suit to be tried by the other Court as the Court of First Instance.

We hold that the suit with which this appeal is concerned was instituted on the 4th February, 1929 and therefore the appellant had no right of a renewal of the kanom. Consequently the appeal will be dismissed but there will be no order as to costs as it has proceeded *ex parte*.

B. V. V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

Kuntamukkala Venkateswara Rao .. *Petitioner** (*Defendant*)

v.

Sree Raja Kunduru Lakshmikantharao Bahadur Zamindar Garu and others. *Respondents* (*Plaintiffs*).

Madras Agriculturists' Relief Act, (IV of 1938), Ss. 9, 15 and 19—Arrears of rent—Promissory note in substitution of—Defence under S. 15—Whether debt without consideration—Scaling down under the circumstances, whether permissible.

To a suit on a promissory note for arrears of rent the defence was that the amount was not due because it represented rent which must be deemed to be discharged by reason of S. 15 of Act IV of 1938.

Held, granting that the promissory note would operate only as a conditional discharge of the liability for rent and that if it should be found defective, the promisee might (if it was not barred) fall back on the original right to claim rent, still the debtor could not compel the promisee to treat his claim as one for rent whereas in fact it was nothing of the kind, or to treat the note which was in substitution for a liability for rent, as being without consideration, because a claim based on the liability for rent, would be met by a defence under S. 15.

Ramadoss Reddiar v. *Munuswami Reddiar*, (1940) 2 M.L.J. 825, followed.

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* C. R. P. No. 252 of 1939. 17th February, 1941.

Venkateswara Rao *v.* Lakshmikantharao.

Petition under S. 25 of Act IX of 1887 praying that the High Court will be pleased to revise the decree of the Court of the District Munsif of Bezwada dated the 24th September, 1938 and passed in S. C. S. No. 358 of 1938.

Ch. Raghava Rao for Petitioner.

S. Venugopala Rao for Respondents.

The Court delivered the following

JUDGMENT.—Petitioner contended in defence to a suit on a promissory note that the amount was not due because it represented rent which must be deemed to be discharged by reason of S. 15 of Act IV of 1938. A Bench of which I was a member held in *Ramadoss Reddiar* v. *Munuswami Reddiar*[1], following *The Commissioner of Income-tax, Madras* v. *Zamindar of Kirlampudi*[2], that a decree on a promissory note for arrears of rent is a decree for a debt and not a decree for rent and that it is to be scaled down under Ss. 9 and 19 and not under S. 15. An attempt has been made to distinguish that decision on the ground that it related to a decree, whereas, here, we are concerned with a suit on a promissory note to which a plea of failure of consideration may be raised. The distinction made is, in my opinion, fallacious. The basis of our decision was that on the taking of the note the character of the liability changed and that it ceased to be rent. Granted that the promissory note would operate only as a conditional discharge of the liability for rent and that if it was found to be defective the promisee might (if it was not barred) fall back on the original right to claim rent, I do not think that it follows that the debtor can compel the promisee to treat his claim as one for rent whereas in fact it is nothing of the kind, or that he can treat the note which was in substitution for a liability for rent as being without consideration, because a claim based on the liability for rent, which has not been made, would be met by a defence under S. 15. In this view I dismiss the petition with costs.

K. C. *Petition dismissed.*

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1. (1940) 2 M.L.J. 825.
2. (1931) 63 M.L.J. 20: I.L.R. 55 Mad. 830 (S.B.).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

Raja Saheb Meharban I Dostan Sri Rajah Rao Venkata Kumara Mahipath Suryarao Bahadur Garu. ... *Petitioner** (*Plaintiff*)

v.

Puramsetti Venkatarao and another ... *Respondents* (*Defendants*).

Suryarao Bahadur Garu *v.* Venkatarao.

Provincial Small Cause Courts Act (*IX of* 1887), *S.* 16—*Civil Procedure Code* (*V of* 1908), *Ss.* 15 *and* 102—*Suit on the Original Side—Of Small Cause nature—Court having no jurisdiction to entertain the suit as a Small Cause one—Right of appeal—Second Appeal.*

Where a suit is filed on the Original Side of a Munsif's Court because the District Munsif had no jurisdiction to try it as a Small Cause suit, that suit cannot be considered to be a Small Cause suit. All that can be said is that the suit is of a Small Cause nature. There is nothing in the Provincial Small Cause Courts Act or in the Civil Procedure Code, which says that no first appeal lies in such cases. The Provincial Small Cause Courts Act applies only to Small Cause suits, and although S 102 of the Civil Procedure Code, is a bar to a Second Appeal there is nothing in the Act which prohibits a First Appeal. An appeal does lie in the Court below, because the District Munsif had no jurisdiction to entertain the suit on the Small Cause side.

No Second Appeal lies by virtue of S. 102 of the Civil Procedure Code.

Kollipara Seetapaty v. *Kantipati Subbayya*, (1909) 20 M.L.J. 718: I.L.R. 33 Mad. 323, (F.B.) referred to and explained.

Petition under S. 115 of Act V of 1908 praying that the High Court will be pleased to revise the decree of the Court of the Subordinate Judge of Cocanada in A. S. No. 170 of 1936 preferred against the decree of the Court of the District Munsif of Peddapuram in O. S. No. 326 of 1934.

Ch. Raghava Rao for Petitioner.

Tatavarti Satyanarayana for Respondents.

The Court delivered the following

JUDGMENT.—The plaintiff brought this suit for compensation for water taken by the defendants from the source of the plaintiff. It was dismissed with costs. In appeal, it was urged by the defendants that no appeal lay. The plaintiff (appellant) admitted by implication that an appeal would not lie unless the suit were of the nature described in Arts. 13 and 35 (*i*) and (*ii*) of Sch. II to the Provincial Small Cause Courts Act. It was held by the learned Subordinate Judge that the suit was not covered by either of these articles and he consequently held that

* C. R. P. No. 2204 of 1940 (S. A. No. 66 of 1938 converted into C. R. P.) 11th December, 1940.

Suryarao Bahadur Garu. v. Venkatarao.

an appeal did not lie. The appeal was accordingly dismissed. In the grounds of appeal to this Court, it was again contended that Arts. 13 and 35 (*i*) and (*ii*) covered a suit of this kind. In view of my decision in S. A. No. 1067 of 1937 of the 25th September, 1940, this point was not pressed; but it is now argued that although the suit was of a Small Cause nature, an appeal did lie.

The appellant's contention seems to be well founded. It was assumed in *Kollipara Seetapaty* v. *Kantipati Subbayya*[1], that the decision in a suit which should have been tried on the Small Cause side but which was actually tried on the Original Side of the same Court was final and that no appeal therefore lay. The point did not really fall for decision there; but that has been taken as the law ever since in cases where a Court has no jurisdiction by virtue of S. 16 of the Provincial Small Cause Courts Act to try a suit on the Original Side. Where however a suit is filed on the Original Side because, as here, the District Munsif has no jurisdiction to try it as a Small Cause suit, that suit cannot be considered to be a Small Cause suit. All that can be said is that the suit is of a Small Cause nature. There is however nothing in the Provincial Small Cause Courts Act or in the Civil Procedure Code, which says that no first appeal lies in such cases. The Provincial Small Cause Courts Act applies only to Small Cause suits, and although S. 102 of the Civil Procedure Code, is a bar to a Second Appeal, there is nothing in the Act which prohibits a First Appeal. An appeal did therefore lie in the Court below because the District Munsif had no jurisdiction to entertain the suit on the Small Cause side.

No Second Appeal lies by virtue of S. 102 of the Civil Procedure Code; so that if the appellant is to succeed, this appeal must first be converted into a revision petition and then I must exercise my discretion in his favour. He should undoubtedly have raised the point which has now been discussed both in the Court below and in the grounds of appeal here. This appeal will be converted into a revision petition, the petition allowed, and the First Appeal remanded for disposal on the merits, only if the appellant pays the costs of the respondents both in this Court and in the lower Appellate Court within three weeks of the receipt of the records in the lower Appel-

1. (1909) 20 M.L.J. 718: I.L.R. 33 Mad. 323. (F.B.).

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late Court. Otherwise, this appeal will stand dismissed with costs.

After dictating the above but before signing the transcript, it struck me that the Subordinate Judge might have had jurisdiction over the Peddapuram Munsif, and an inquiry in the office confirmed my suspicion. The Subordinate Judge did have jurisdiction to try this suit as a Small Cause suit. The question is whether this affects the above decision. At first sight it would appear that as the suit should have been tried on the Small Cause side, it should be treated as a Small Cause decision against which there is no appeal; but Mr. Raghava Rao has met this by two arguments. He first of all refers to the wording of S. 15 of the Civil Procedure Code, which lays down that 'every suit shall be instituted in the Court of the lowest grade competent to try it'. He argues that the District Munsif was competent to try this suit in spite of the provisions of S. 16 of the Provincial Small Cause Courts Act. Section 16 says:

> " Save as expressly provided by this Act or by any other enactment for the time being in force, a suit cognizable by a Court of Small Causes shall not be tried by any other Court having jurisdiction within the local limits of the jurisdiction of the Court of Small Causes by which the suit is triable."

He contends that there is another enactment in force which prevents the section from operating and that is S. 15 of the Civil Procedure Code. He argues that as the Court of the District Munsif was lower in grade to that of the Subordinate Judge, the suit had to be instituted in the District Munsif's Court. Mr. Raghava Rao admits that in practice this would mean that no Subordinate Judge would ever be able to exercise his Small Cause jurisdiction; because no Subordinate Judge has pecuniary jurisdiction on the Small Cause side beyond Rs. 3,000, up to which amount a District Munsif can try a suit on the Original Side. Although it would seem reasonable to suppose that the District Munsif was not competent to try the suit because of S. 16, Mr. Raghava Rao has quoted an authority to the contrary. The meaning of 'competent to try' came up for decision in *Chockkalingam* v. *Palaniappa*[1] and the learned Judges there, after referring to various cases in which a somewhat similar question had arisen, came to the conclusion that a District Munsif has jurisdiction to try and is competent to try a suit beyond his own pecuniary jurisdiction on the Small Cause

1. (1932) 63 M.L.J. 689: I.L.R. 55 Mad. 960.

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side but within the pecuniary jurisdiction of the Subordinate Judge, though there is the circumstance or accident that that particular class of suit is removed from its purview. In that case they were considering whether under S. 24 (1-*a*) a District Court can transfer a suit from a Small Cause Court to another Court on the Original Side, and they pointed out that S. 24 (4) would have no meaning if it were true that the District Munsif to whom the suit was transferred was not competent to try the suit because of S. 16 of the Provincial Small Cause Courts Act.

It is not necessary however, to try to reconcile the above decision with the interpretation of S. 16 of the Provincial Small Cause Court Act and S. 15 Civil Procedure Code, that common sense seems to require; because I think Mr. Raghava Rao's second argument is sound. In *Kollipara Seetapati* v. *Kantipati Subbayya*[1], the trial on the Original Side in the District Munsif's Court was referred to his Small Cause jurisdiction and his decree was upheld apparently on the ground that as he was bound to try the suit on the Small Cause side, the decree should be looked upon as a decree on the Small Cause side. In the present case the trial by the District Munsif on the Original Side cannot be regarded as a disposal on the Small Cause side of the Court of the Subordinate Judge; and I do not think therefore that the principle laid down in *Kollipara Seethapathy* v. *Kantipati Subbayya*[1], should be applied to a case where the Small Cause jurisdiction is exercised by a Court other than that in which the suit is tried on the Original Side. It follows that the order of remand must stand.

K. C. *Petition allowed conditionally.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

Sreepathi Balaiah *alias* Bala Gurumurthy and another .. *Petitioners** (*Respondents*)

v.

Darsi Ramayya and another ... *Respondents* (*Petitioners*).

Sreepathi Balaiah v. Ramayya.

Civil Procedure Code (V of 1908), Ss. 148 and 151—Error of Court's officer in maintaining entries—Inherent right of Court invoked for

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1. (1909) 20 M.L.J. 718: I.L.R. 33 Mad. 323 (F.B.).

* C. R. P. No. 1223 of 1940. 11th December, 1940.

extending time to prevent party getting damnified by the mistake—Proper order.

Sreepathi Balaiah *v.* Ramayya.

When a Court has granted time within which a payment must be made and has declared that in default of payment within the time specified the proceedings will stand dismissed, there is no power under S. 148 of the Code of Civil Procedure after the date on which those proceedings would stand dismissed, to extend the time in which the payment was to be made.

But where the application granted by the lower Court was not one made under S. 148 but under S. 151 of the Code invoking the inherent power of the Court and it was not a mistake by the party which led to the failure to comply with conditions but of the Court officer in maintaining correct entries in the Court record.

Held, that the Court has inherent power under S. 151 of the Code to prevent a party from being damnified by the error of the Court's own officer.

Petition under S. 115 of Act V of 1908 praying that the High Court will be pleased to revise the order of the District Court of Kurnool dated 4th July, 1940, and made in M. P. No. 298 of 1940 in C. M. A. No. 7 of 1940 (I. A. No. 816 of 1939 in O. S. No. 430 of 1938 D.M.C. Markapur.)

Kasturi Seshagiri Rao for Petitioners.

W. Kothandaramiah for Respondents.

The Court delivered the following

JUDGMENT.—This Civil Revision Petition arises out of an order passed in the following circumstances. The respondents were the appellants before the District Judge and their appeal was preferred against an order decreeing the suit *ex parte*. The District Judge passed an order that on condition the appellants paid Rs. 15 within one month the appeal would stand allowed and that in default of payment of the sum of Rs. 15 as specified above the appeal would stand dismissed with costs. It would appear that when this judgment was pronounced neither side was present. In incorporating the result of the judgment into the rough diary maintained by the Court, an unfortunate error was committed; instead of the sum of Rs. 15 the sum of Rs. 12 was inscribed. The respondents' advocate referring to the rough diary found that Rs. 12 had to be paid and without undue delay paid that sum to the petitioners' advocate. This payment was made two weeks after the judgment was pronounced. When the Court re-opened after the vacation it was discovered that a mistake had been made and that an amount of Rs. 3 had not been paid which should have been paid in order to comply with the formal order. The respondents therefore filed an application under S. 151, Civil

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Procedure Code to extend the time to pay the balance of the amount of costs. The learned District Judge accepted the contention that there was a *bona fide* mistake and extended the time till the date of that order and the balance was paid at once. In revision it is contended by the petitioners that by the terms of the original order of the 15th April, the appeal would stand dismissed as from the 15th May, owing to the failure of the appellants (respondents here) to pay Rs. 15 within the time allowed and that as the appeal had been dismissed the Court had no jurisdiction to grant an extension of time at a later date.

The petitioners rely upon the observations of the Bench which decided *Balakrishna Aiyar* v. *Parvathammal*[1]. It is true that the finding in that case made it unnecessary for the Court to decide whether there was power to extend the time in circumstances similar to those now under consideration. But the learned judges discuss the law on the subject at some length and give a considered opinion which, though perhaps not an actual decision, must be treated with great respect. With respect I may say that I see no reason to differ from that opinion. When a Court has granted time within which a payment must be made and has declared that in default of payment within the time specified the proceedings will stand dismissed, there is in my opinion no power under S. 148 of the Code of Civil Procedure after the date on which those proceedings would stand dismissed, to extend the time in which the payment was to be made; moreover I should not be inclined to refuse to interfere in revision with an order passed under S. 148 in such circumstances without jurisdiction, merely on the ground of hardship to the person adversely affected.

But the present case stands on a somewhat different footing. The application granted by the lower Court was not made under S. 148 of the Code of Civil Procedure, but under S. 151 invoking the inherent powers of the Court and it was not a case of a mere mistake by the party which led to his failure to comply with the conditions. The basic mistake which led to the trouble was the mistake of the Court's officer. The rough diary is maintained by the Court for the benefit of parties so that they may readily find out what has been the nature of the order passed. In the present case the rough diary

1. (1927) 53 M.L.J. 494.

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contained an entry to the effect that the respondents must pay Rs. 12 within one month and they complied with that order. Unfortunately that order wrongly set forth the nature of the actual order of the Court. But it seems to me that the Court must have inherent power to prevent a party from being damnified by the error of the Court's own officer. The respondents did that which they should have done according to the order as embodied in the rough diary. The money was received without objection by the petitioners' advocate who seems to have been under the same misapprehension owing to the terms recorded in the rough diary; and though, in my opinion, the District Judge had no power under S. 148 of the Code of Civil Procedure to re-open a closed matter and give an extension of time, he had power under S. 151, Civil Procedure Code to do that which was necessary for the ends of justice in order to set right the consequences of an unfortunate error committed by an officer of Court. In this view I decline to interfere in revision with the District Judge's order, but in the circumstances I direct each party to bear his own costs in this Court.

K. C. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

Maruthuvamalai Moopanar .. *Appellant* (1st Respondent).*

v.

Avadaiachi .. *Respondent (Petitioner).*

Maruthuvamalai Moopanar v. Avadaiachi.

Civil Procedure Code (V of 1908), O. 21, r. 19—If limitation runs against the person entitled to smaller amount—Charge in favour of Government for court-fee—Execution by Government—Payment of court-fee amount by defendant—Failure to establish set off of the defendant's cross decree—If bar to plead when decree-holder executes.

A maintenance decree dated 30th September, 1935 directed that the first defendant should pay plaintiff maintenance at a particular rate and further provided that the plaintiff should pay Rs. 282-12-0 to the first defendant for his costs and Rs. 739-15-0 as court-fee due to Government and that the first defendant should pay Rs. 166-11-0 to the plaintiff towards her costs. The plaintiff's charge for maintenance was burdened with a charge in favour of the Government for the amount of this court-fee. In 1936 the Government executed the decree for the court-fee and the first defendant first paid

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* A. A. O. No. 205 of 1939. 7th November, 1940.

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the balance due to the plaintiff after deducting the Rs. 282-12-0 in his favour but later he paid up the balance. On 9th November, 1938 the plaintiff filed an E. P. for balance of the maintenance due after deducting the major portion of the court-fee paid but not the costs decreed to the defendant.

Held, that the defendant was entitled to set off his decree for costs against the claim. Limitation cannot run against the person who is entitled to a lesser decree at a time when that decree is not executable, having regard to the provisions of O. 21, r. 19, Civil Procedure Code.

The defendant's failure to establish the right to set off when the Government executed the decree for court-fee is no bar to claim the set off in the execution petition by the plaintiff.

Appeal against the order of the Court of the Subordinate Judge of Ramnad at Madura dated the 30th March, 1939 and made in E. P. No. 72 of 1938 in O. S. No. 14 of 1932.

M. R. Venkatarama Aiyar and *G. Srinivasa Aiyangar* for Appellant.

T. G. Raghavachariar for Respondent.

The judgment of the Court was delivered by

Wadsworth, J.

Wadsworth, J.—This appeal arises out of an order in execution of a maintenance decree. The decree was dated 30th September, 1935. It directed the first defendant to pay maintenance at a certain rate to the plaintiff and also directed the first defendant to pay Rs. 166-11-0 towards her costs. It directed the plaintiff to pay Rs. 282-12-0 as costs to the first defendant and to pay Rs. 739-15-0 as court-fee due to Government and the plaintiff's charge for maintenance was burdened with a charge in favour of the Government for the amount of this court-fee. The Government in 1936 executed the decree for the latter amount. In order to save the properties the first defendant paid into Court the balance due to the plaintiff after deducting the amount of his decree for costs. Apparently, it was objected on behalf of the Government that the Government's charge should be over the whole amount of the maintenance decree and not over the net amount and the first defendant, on 30th June, 1936 paid up the balance making Rs. 750 and odd claimed by the Government. On 9th November, 1938 the present execution petition was filed by the plaintiff claiming the balance due for maintenance less the major portion (but not the whole) of the amount paid by the first defendant towards court-fee, no deduction being made in respect of the first defendant's decree for costs. When an objection was raised by the first defendant that he was entitled to set off for the amount of

his decree for costs, the lower court held that this claim could not be sustained because the execution of that decree for costs was time-barred.

It appears that in coming to this conclusion the learned Judge overlooked the provisions of O. 21, r. 19, Civil Procedure Code. Under that rule when the decree provides for the recovery of sums by two parties one against the other, it is only the party to whom the larger amount is due who is entitled to execute the decree. It seems to us to follow that limitation cannot run against the person who is entitled to the lesser decree at a time when that decree is not executable having regard to the provisions of O. 21, r. 19. It is true that after the payment to Government in 1936 there was for a time a balance in favour of the first defendant as against the plaintiff. But that balance was being steadily reduced as maintenance accrued due and in any case the present claim is preferred within three years of the time of this payment. There can therefore be no question of limitation.

It is, however, contended for the plaintiff that in some way the first defendant is barred from claiming to adjust his decree for costs against the plaintiff's decree, because, when the Government were executing the decree by enforcing the charge over the plaintiff's right to maintenance, the first defendant failed to establish his right to set off against the Government's claim the amount of his decree for costs. We are unable to understand how the fact that the Government were somehow or other able to recover from the first defendant a larger amount than was strictly payable by him at that time can be held to have barred a claim by the first defendant to adjust his decree against the plaintiff when the latter should come to execute. The most that these proceedings between the Government and the first defendant can be taken to have finally decided is that the extent of the Government's charge is not limited to the net amount of the plaintiff's claim for maintenance but extends over the gross amount of that claim. There was no decision that the first defendant could not in an execution petition brought by the plaintiff claim to adjust the amount of his decree against that of the plaintiff.

In the result therefore the appeal is allowed with costs here and in the Court below and the execution petition is

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Wadsworth, J.

remitted to the lower Court for disposal in the light of this judgment.

S.V.V. *Appeal allowed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice,* MR. JUSTICE VENKATARAMANA RAO, MR. JUSTICE ABDUR RAHMAN, MR. JUSTICE KRISHNASWAMI AIYANGAR AND MR. JUSTICE HORWILL.

Venkateswara Sarma, styled Gnanasivacharia Swamigal, Matathipathi and Guru of Perur Mel Mutt, for himself and on behalf of the Mutt situate at Perur .. *Appellant** (*Plaintiff*).

v.

S. N. Venkatesa Aiyar and others .. *Respondents* (*Defendants 1 to 12*).

F.B.

Venkateswara Sarma v. Venkatesa Aiyar.

Limitation Act (*IX of* 1908), *S.* 6 *and Arts.* 134-B *and* 144—*Alienation by head of math—Suit to set aside by succeeding manager—Time limit—Interval of time between death of previous manager and appointment of successor—Starting point of limitation—Minority of succeeding manager—Extension of limitation.*

Held, by the majority of the Full Bench (Abdur Rahman and Krishnaswami Aiyangar, JJ., dissenting);

(1) that where a manager of a Hindu Religious Institution makes an alienation of the property of the institution for valuable consideration and the succeeding manager seeks to impeach the alienation by suit, Art. 134-B of the Limitation Act will apply even when there is an interval of time between the death, resignation or removal of the previous manager and the election or appointment of the subsequent manager;

(2) that even assuming that Art. 144 is applicable to such a case adverse possession commences from the date of the death, resignation or removal of the previous manager who effected the alienation and not from the date of the election or appointment of the succeeding manager; and

(3) that if the succeeding manager happens to be a minor at the date of the election or appointment he will be entitled to the benefit of S. 6 of the Limitation Act, but where his appointment is made after the period of limitation has started to run the section will not help him.

Appeals against the decrees of the Court of the Subordinate Judge of Coimbatore dated the 26th August, 1936 and passed in O. S. Nos. 136 and 180 of 1934, respectively.

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* Appeals Nos. 26 and 27 of 1937. 17th December, 1940.

The Advocate-General (*Sir A. Krishnaswami Aiyar*) and *P. Govinda Menon* for Appellant.

B. Sitarama Rao, A. V. Viswanatha Sastri, A. C. Sampath Aiyangar, N. C. Vijayaraghavachariar and *D. Ramaswami Aiyangar* for Respondents.

These appeals coming on for hearing, the Court, *Venkataramana Rao* and *Abdur Rahman, JJ.*, made the following

ORDER OF REFERENCE TO A FULL BENCH.*

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Venkataramana Rao, J.—The main question for decision in this appeal is one of limitation. The relevant facts are few and not in dispute. The plaintiff is the Matathipathi of Perur Mutt, Coimbatore District. The suit is to recover possession of certain properties belongihg to the Mutt which were alienated by the plaintiff's predecessor in office Sivasubramania Swamigal. The earliest alienation was in 1876 and the last alienation in 1910. The said Sivasubramania Swamigal died on 15th July, 1918, without nominating a successor. The disciples of the Mutt appointed the plaintiff as his successor on 7th June, 1922. This suit was instituted on 12th April, 1934, admittedly twelve years after the death of Sivasubramania Swamigal but within twelve years from the plaintiff's succession to office. The plaintiff's contention is that the right to sue accrued to him only from the date of his appointment, that is, from 7th June, 1922, that under Art. 144 of the Limitation Act, he can sue within twelve years from that date and that the suit is within time. The contention of the defendants is that Art. 134-B of the Limitation Act, applies to the case and the suit is barred by limitation. The learned Subordinate Judge upheld the contention of the defendants and dismissed the plaintiff's suit. The question is whether this view is sound.

The learned Advocate-General who appears for the appellant contends that Art. 134-B of the Limitation Act, would not apply to the case because on the date of the death of Sivasubramania there was no manager in existence that Art. 134-B would be applicable only to cases where on the death or resignation or removal of an incumbent his successor is in being, that the residuary article, Art. 144 would apply to the case, that if Art. 144, applies the plaintiff is in time because there must be someone against whom adverse possession must run and there was no such person in existence on the date of the death of Sivasubramania. He also contends that the first and the third columns of Art. 134-B should be read together and on so reading them that Article cannot be applied because there was no manager in existence on the date of the death of Sivasubramania Swamigal.

*2nd May, 1940.

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Thus the substantial questions for decision are (1) whether Art. 134-B or Art. 144 of the Limitation Act, applies to the case and (2) if Art. 144 applies, whether the suit is in time. Art. 134-B of the Act runs thus:

Description of suit.	Period of Limitation.	Time from which period begins to run.
134-B. By the Manager of a Hindu, Muhammadan or Buddhist religious or charitable endowment to recover possession of immovable property comprised in the endowment which has been sold by a previous manager for a valuable consideration.	Twelve years.	The death, resignation or removal of the transferor.

Giving the language its plain meaning, it *prima facie* applies to the case. The present suit is by the manager of a Mutt, a religious endowment within the meaning of Art. 134-B to recover possession of the immovable property of the Mutt, that is, property comprised in the endowment which has been transferred by the previous manager for a valuable consideration. As observed by their Lordships of the Privy Council in *Abhiram Goswami v. Shyama Charan Nandi*,[1]

"Statutes of limitation, like all others, ought to receive such construction as the language, in its plain meaning imports."

Again, dealing with an argument based on hardship, their Lordships in *Nagendranath De* v. *Sureschandra De*[2] in construing Art. 182 (2) of the Limitation Act, remarked thus:

"They think that the question must be decided upon the plain words of the Article. . . . There is in their Lordships' opinion no warrant for reading into the words quoted any qualification either as to the character of the appeal or as to the parties to it; the words mean just what they say. The fixation of periods of limitation must always be to some extent arbitrary and may frequently result in hardship. But in construing such provisions, equitable considerations are out of place and the strict grammatical meaning of the words is, their Lordships think, the only safe guide."

But it is said that that "safe guide" ought not to be followed in the present case because unless there be a manager in existence on the date mentioned in the third column of the article, the period of limitation which is provided by that article would be abridged and it could never have been the intention of the Legislature so to do and all statutes of limitation must be construed subject to the general principle that limitation must only be deemed to run from the date when a cause of action accrues and a cause of action does not exist unless there is a person in existence capable of suing. I am not able to agree with this contention of the learned Advocate-General because the principle that is sought to be applicable is not such a general principle that every article of the Limitation Act must be construed

1. (1909) 19 M.L.J. 530: I.L.R. 36 Cal. 1003 at p. 1014: L.R. 36 I.A. 148 (P.C.).
2. (1932) 63 M.L.J. 329: L.R. 59 I.A. 283: I.L.R. 60 Cal. 1 (P.C.).

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as being governed by it. To test the soundness of this contention it may be necessary to examine the scope of the said principle and how it has been applied both in English and Indian Law. In *Meyyappa Chetty* v. *Supramanian Chetty*,[1] Lord Parker enunciated this principle as follows:

"For the purpose of the English Statutes of limitation time runs from the accrual of the cause of action but a cause of action does not accrue unless there be someone who can institute the action."

If the provisions of the several English Statutes are examined, it will be found that in most of the cases time runs only from the accrual of the cause of action. The earliest case where this principle was enunciated was the case of *Murray* v. *The East India Company*,[2] In that case the Statute of Limitation which was considered was 21 Jac. 1, Chap. 16, Sec. 3, under which all actions upon the case, etc., shall be brought within six years next after the cause of such action. In considering this provision Abbott, C.J., observed:

"Independently of authority, we think that it cannot be said that a cause of action exists, unless there be also a person in existence capable of suing."

It may be said that even now this is the rule with reference to cases of simple contract debts and personal actions to which the statute 21 Jac. applies where the period of limitation begins when the cause of action accrues. Even with reference to suits in ejectment the principle applicable was the same because the relevant words of that statute are "no person or persons shall make entry into any lands, etc., but within twenty years next after his or their right or title which shall hereafter first descend or accrue to the same". In construing this provision, Abbott, C.J., remarked,

"The object manifestly is to limit the time of entry or suit to a person *in esse* capable of entering or suing and nothing more."

Therefore where a Statute of Limitation specifically fixes the cause of action as the starting point of limitation there can be no doubt of the application of the principle contended for. Even in English Law it will be seen that this principle is not applied in all cases. In 1833 when the Real Property Limitation Act was passed, 3 and 4, William 4, Ch. 27, it was provided by S. 6 of that Statute that for the purposes of that Act an administrator claiming the estate or interest of a deceased person of whose chattels he shall be appointed administrator shall be deemed to claim as if there would be no interval of time between the death of such deceased person and the grant of the letters of administration. In, *In re, Williams*: *Davies* v. *Willams*[3] where letters of administration were granted to the estate of a deceased man 37 years after his death it was held that the right to recover the property by the administrator was barred by limitation. This principle was extended even to cases arising under S. 40 of the said

1 (1916) L.R. 43 I.A. 113: 1 A.C. 603 at p. 610 (P.C.).
2. (1821) 5 Barn and Ald. 204-217: 24 R.R. 325: 106 E.R. 1167.
3. (1886) 34 Ch.D. 558.

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Act which related to enforcement of charges on land. Examining the provisions of the Indian Statute of Limitation enacted from the earliest time the principle that is contended for was not kept in view in all cases; for example S. 17 of the Limitation Act, which provides that,

> "Where a person who would, if he were living, have a right to institute a suit or make an application, dies before the right accrues, the period of limitation shall be computed from the time when there is a legal representative of the deceased capable of instituting or making such suit or application,"

is not made applicable to suits to enforce rights of pre-emption or to suits for the possession of immovable property or of an hereditary office. It may be instructive to note that Whitley Stokes who drafted the bill which subsequently became Act IX of 1871, which replaced Act XV of 1859, in his introduction to the Limitation Act of 1877, in his Anglo-Indian Code on page 945, gives the principal amendments made by the Act of 1877, and one of such amendments is stated thus:

> "Except in the *case of suits for the possession of land and hereditary offices*, a right to sue is not to accrue unless there is at the time a person in existence capable of suing as also a person in existence capable of being sued."

If the various articles of the Indian Limitation Act, are examined, it will be seen that in many cases the fixation of periods is more or less arbitrary and in those cases it may safely be said that the Legislature had in view the paramount public policy of quieting titles especially with regard to immovable property. In *Charu Chandra Pramanik* v. *Nahush Chandra Kundu*,[1] a case on which the learned Advocate-General also placed some reliance, Ashutosh Mukherji, J., referring to this principle and to the case of *Murray v. The East India Co.*,[2] remarked thus:

> "It may be difficult to fit this view into the framework of the provisions of the Indian Limitation Act, except in cases which fall within the scope S. 17."

The scope of the principle was exhaustively considered by Manmathanath Mukherji, J., in the case reported in *Sm. Sarat Kamini Dasi v. Nagendranath Pal*,[3] where the learned Judge after examining the various provisions and articles of the Limitation Act and decided cases sums up his conclusion at page 980 thus:

> "A careful study of the third column of the Schedule reveals the outstanding fact which cannot be ignored, namely, that the starting point of limitation does not always synchronise with the cause of action; in many cases it does, but in others it dates from some specified events which again are either anterior or posterior to the accrual of the cause of action. . . . A saving or exception not found in the statute will not therefore be implied however much it may be within the reason of those that are recognised by the statute or however much the ends of justice in a particular case may demand. The periods prescribed by the Act are more or less arbitrary and the fixing

1. (1922) I.L.R. 50 Cal. 49 at p. 67.
2. (1821) 5 Barn and Ald. 204-217: 24 R.R. 325: 106 E.R. 1167.
3. (1925) 29 C.W.N. 973.

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of the periods is founded on grounds of consideration of public policy. The statute may bear hardly on individual cases but the individual hardship will upon the whole, be less by withholding from one who has slept upon his right than by taking away from the other what he has long been allowed to consider as his own. These considerations cannot be ignored."

Srinivasa Ayyangar, J., in *Seeti Kutti* v. *Kunhi Pathumma*,[1] gives expression to a similar view:

"There may no doubt be cases where on grounds of public policy or owing to the difficulty in fixing precisely the time when the cause of action arises, a limited period may be fixed beginning from more or less arbitrary starting points; for example, a suit to recover movable property from a depositary or pawnee must, under Art. 145 of the Limitation Act, be brought within thirty years from the date of the deposit or pawn, though there may be a contract between the parties fixing a time before which the depositor or pawnor could not recover the property from the bailee."

As Coutts Trotter, J., remarked in *Seeti Kutti* v. *Kunhi Pathumma*,[1] "it is no doubt a startling result to say that a man's cause of action can be barred before it has accrued, but if the plain words of the enactment involve that, we cannot rewrite it." The observations of the Privy Council in *Lasa Din* v. *Gulab Kunwar*,[2] would show that the starting point of limitation does not always synchronise with the accrual of the cause of action.

The learned Advocate-General adverted to the state of the law before the Amending Act, I of 1929, which amended the Limitation Act, by enacting among other provisions Art. 134-B and in support of his contention he stated that the legislature must have intended that in cases such as the present Art. 144 should apply and not Art. 134-B. I have given due consideration to this contention and my conclusion is that the history of the legislation which it is permissible to look at if any question of ambiguity arises, clearly points that the legislature intended to fix a definite and arbitrary starting point and not to have the date of succession to the office of the manager as the starting point. Before the enactment of Art. 134-B it was in *Vidya Varuthi* v. *Balusami Aiyar*,[3] that their Lordships of the Privy Council definitely indicated that Art. 134 of the Limitation Act, would not apply and that in the case of an alienation made by a manager of a religious endowment Art. 144 would apply. That case was one of a permanent lease. Though the principle of that decision was held to be applicable even in the case of sales and mortgages in later decisions of the Privy Council the matter was not free from doubt. Various High Courts in India interpreted that case differently, vide *Lalchand Marwari* v. *Ramrup Gir*.[4] In the case of sales and mortgages it was held that adverse possession would begin to run from the date of the alienation and not from the date of the termination of the office of manager. In some cases the view

1. (1917) 33 M.L.J. 320: I.L.R. 40 Mad. 1040 (F.B.).
2. (1932) 63 M.L.J. 187: I.L.R. 7 Luck. 442: L.R. 59 I.A. 376 (P.C.).
3. (1921) 41 M.L.J. 346: I.L.R. 44 Mad. 831: L.R. 48 I.A. 302 (P.C.).
4. (1925) 50 M.L.J. 289: L.R. 53 I.A. 24: I.L.R. 5 Pat. 312 (P.C.).

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was taken that time would run only from the date of succession to the office of the manager. It was to put an end to this state of conflict that the legislature enacted Art. 134-B. In order to understand the underlying policy of the legislature in enacting in the third column of Art. 134-B an arbitrary starting point, it may be necessary to briefly advert to the legal conception of idol or Mutt and the status of a manager in relation thereto. According to Hindu and Muhammadan jurisprudence, a religious institution such as a Mutt is treated as a juristic entity with a legal personality capable of holding and acquiring property. The ownership is in the institution or idol and the manager holds the property of the Mutt or the temple merely as a manager save by custom or usage. He may have beneficial rights to the income and that too, for the utilisation thereof for the purposes of the institution and not for his personal benefit. In more than one decision of the Privy Council this aspect was clearly pointed out. In a very early case in *Maharanee Shibessouree Debia* v. *M. Acharjo*,[1] Lord Chelmsford defined the position of a shebait thus:

"The shebait had not the legal property, but only the title of manager of a religious endowment. In the exercise of that office, she could not alienate the property, though she might create proper derivative tenures and estates conformable to usage."

Again in *Prosunno Kumari Debya* v. *Golabchand Baboo*,[2] the position of a manager was thus defined:

"It is only in an ideal sense that property can be said to belong to an idol; and the possession and management of it must in the nature of things be entrusted to some person as shebait or manager. It would seem to follow that the person so entrusted must of necessity be empowered to do whatever may be required for the service of the idol, and for the benefit and preservation of its property, at least to as great a degree as the manager of an infant heir."

It would be seen from these two decisions that a Mutt or an idol is a juristic entity and the manager occupies the position of a guardian of a minor in whom the right to take the necessary action on behalf of the minor is vested for the purpose of safeguarding the estate of the minor. This aspect was very clearly indicated by their Lordships of the Privy Council in *Jagadindra Nath Roy* v. *Hemanta Kumari Debi*,[3] thus:

"There is no doubt that an idol may be regarded as a juridical person capable as such of holding property, though it is only in an ideal sense that property is so held. And probably this is the true legal view when the dedication is of the completest kind known to the law . . . assuming the religious dedication to have been of the strictest character, it still remains that the possession and management of the dedicated propery belongs to the shebait. And this carries with it the right to bring whatever suits are necessary for the protection of the property. Every such right of suit is vested in the shebait, not in the idol."

These observations show that when there is a manager the right of suit is vested in him because he is the person who is legally compe-

1. (1869) 13 M.I.A. 270 (P.C.).
2. (1875) 14 Beng.L.R. 450 (P.C.).
3. (1904) L.R. 31 I.A. 203: I.L.R. 32 Cal. 129 at p. 140 (P.C.).

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tent to institute an action on behalf of an idol and if the person entitled to institute a suit be at the time from which the limitation is to be reckoned a minor, he would get the benefit of S. 6 of the Limitation Act. Once there is a *de jure* manager, no other person can bring a suit on behalf of the Mutt or idol and he alone represents it: vide *Surendrakrishna Ray* v. *Shree Ishwar Bhubaneshwari Thakurani.*[1] It is thus clear that the title to property of a Mutt is always in the Mutt; it has got juridical status and all rights appurtenant to the ownership of property are possessed by it. When a manager institutes a suit for recovery of property of a religious endowment, the suit is really on behalf of the Mutt or idol to assert the right of the Mutt or idol. Sir Lawrence Jenkins brings out this aspect of the case in *Babaji Rao* v. *Laxmandas,*[2] thus:

"A Mutt, like an idol, is in Hindu Law a juridicial persona capable of acquiring, holding and *vindicating legal rights,* though of necessity it can only act in relation to those rights through the medium of some human agency. When the property is vested in the Mutt, then litigation in respect of it has ordinarily to be conducted by, and in the name of, the manager, not because the legal property is in the manager, but because it is the established practice that the suit would be brought in that form. But a person in whose name a suit is thus brought has in relation to that suit a distinct capacity: he is therein a stranger to himself in his personal and private capacity in a Court of law."

That an idol has the power of suing and is capable of being sued is established by the judgment of the Privy Council in *Pramatha Nath Mullick* v. *Pradyumna Kumar Mullick,*[3] where Lord Shaw at p. 815 remarked thus:

"A Hindu idol is, according to long established authority, founded upon the religious customs of the Hindus, and the recognition thereof by Courts of law a 'juristic entity'. It has a juridical status with the power of suing and being sued. Its interests are attended to by the person who has the deity in his charge and who is in law its manager with all the powers which would, in such circumstances, on analogy be given to the manager of the estate of an infant heir."

According to the strict legal theory in view of the fact the idol or Mutt is a juristic entity capable of vindicating legal rights, limitation or adverse possession certainly runs against the institution and not against the manager. When it is stated that it runs against the manager, it does so against him in a representative capacity. This is clear from the following observations of Sir Arthur Wilson reported in *Damodar Das* v. *Lakhan Das.*[4]

"The learned Judges of the High Court have rightly held that in point of law the property dealt with by the *ekrarnama* was prior to its date to be regarded as vested not in the Mahant, but in the legal entity, the idol, the Mahant being only his representative and manager. And it follows from this that the learned Judges were further right in holding that from the date

1. (1932) I.L.R. 60 Cal. 54 at p. 77.
2. (1903) I.L.R. 28 Bom. 215 at p. 223.
3. (1925) 49 M.L.J. 30: L.R. 52 I.A. 245: I.L.R. 52 Cal. 809 (P.C.).
4. (1910) 20 M.L.J. 624: L.R. 37 I.A. 147: I.L.R. 37 Cal. 885 at p. 894 (P.C.).

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of the *ekrarnama* the possession of the junior *chela*, by virtue of the terms of that *ekrarnama*, was adverse to the right of the idol and of the senior *chela*, as representing that idol, and that the present suit was barred by limitation."

For the purpose of Art. 144 of the Limitation Act that was the view taken in the recent decision of the Privy Council in *Mahadeo Prasad Singh* v. *Karia Bharthi*,[1] where Sir Shadilal construes the third column of Art. 144 at p. 164 thus:

> "It is common ground that the article of the Indian Limitation Act of 1908, applicable to the claim is Art. 144, which prescribes a period of twelve years from the date when the possession of the appellants became *adverse to the Mutt*. . ."

Similar language was used by their Lordships in *Mahanth Ram Charan Das* v. *Naurangi Lal*,[2] where their Lordships formulated the question of adverse possession thus:

> "The question then resolves itself into this: did the possession of the relevant defendant become *adverse to the math* or to the mahanth as representing the math at the date of the relevant assurance or at the date of the death of Rampat Das?"

However Lord Buckmaster in an earlier case, *Subbiah Pandaram* v. *Mahammad Mustapha Maracayar*,[3] made the following observations:

> "It follows therefore that possession during his life is not adverse, and that upon his death the succeeding trustee would be at liberty to institute proceedings to recover the estate, and the statute would only run against him as from the time when he assumed the office."

In the former view whether there is a manager or not, limitation would begin to run from the date of the death or termination of the office of the prior incumbent, whereas according to the latter view it would mean from the time when the manager succeeds to the office. It was to quiet this conflict, as I have already stated, that the starting point was fixed in the third column of Art. 134-B 'death, resignation or removal of the transferor' and not the date of succession to the office and if it is remembered that the suit, although instituted by the manager, was really for the institution, the policy of the legislature in so fixing the starting point is clear, that is, to quiet title or else there would be uncertainty and insecurity in the title to immovable property. It must be remembered also that the manager contemplated in Art. 134-B is not necessarily a *de jure* manager because it is laid down by the Privy Council in *Mahanth Ram Charan Das* v. *Naurangi Lal*,[2] that "a person in actual possession of the math is entitled to maintain a suit to recover property appertaining to it, not for his own benefit, but for the benefit of the math." The Privy Council computed the time from the death

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1. (1934) 68 M.L.J. 499: I.L.R. 57 All. 159: L.R. 62 I.A. 47 (P.C.).
2. (1933) 64 M.L.J. 505: L.R. 60 I.A. 124: I.L.R. 12 Pat. 251 (P.C.).
3. (1923) 45 M.L.J. 588: L.R. 50 I.A. 295: I.L.R. 46 Mad. 751 at p. 756.

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of the previous manager and held that as the *de facto* manager instituted the suit within 12 years therefrom, the suit was held to be in time. If therefore it is not necessary that there should be a *de jure* manager to institute a suit on behalf of the Mutt and a suit can be instituted by a person who is in actual possession of the Mutt and he would for the purpose of the suit be the manager within the meaning of the Article of the Limitation Act, there is no point in making succession to the office as the starting point of limitation. Normally speaking, there is no difficulty in the application of the article to the case of a hereditary manager or a manager nominated by a previous manager according to custom. But the question only arises in cases where a person has to be nominated or elected by a religious body. There must necessarily be some interval between the death or resignation or termination of the office of a prior incumbent and the actual nomination or election of his successor. The legislature must have had in view the law or custom governing the succession to a manager of a religious endowment when they framed the Article. What was contemplated by the legislature was that though there may be no *de jure* manager, there would be someone who will be functioning on behalf of the Mutt till a manager is constituted and he would be capable of instituting the suit on behalf of the institution. It has not been shown in this case and the burden is on the plaintiff to show that there was no person who was not in possession of the Mutt or its properties and therefore could not have instituted a suit to recover possession of the properties. The correct principle would seem to be as put by Sir Charles Sargent, C.J., in an early case reported in *Vithalbowa* v. *Narayan Daji Thite*,[1] where the learned Judge dealing with a similar question made the following observation at page 511:—

"If the defendant's possession was adverse to the ownership of the *math* during the twelve years after Krishnaji's death, the operation of the Act cannot be affected by the circumstance that there was no legal manager of the *math* during that period."

A similar expression of view was given by Page, J., in *Administrator-General of Bengal v. Balkissen Misser*,[2] where the learned Judge after discussing the effect of the observations of the Privy Council in *Jagadindra Nath Roy* v. *Hemanta Kumari Debi*,[3] and *Damodar Das* v. *Lakhan Das*,[4] remarks as follows:

"The law must now be taken to be that down in *Jagadindra's case*,[3] although I confess that I feel somewhat perplexed to find that the right to sue for possession is divorced from the proprietory right to the property which is vested in the idol. In such cases where adverse possession of the premises is proved, does time under the statute of limitation run only against the *shebait*, or against the idol as well, notwithstanding that the right to sue for possession is vested solely in the *shebait*? I think however that

1. (1893) I.L.R. 18 Bom. 507.
2. (1924) I.L.R. 51 Cal. 953.
3. (1904) I.L.R. 32 Cal. 129: L.R. 31 I.A. 203 (P.C.).
4. (1910) 20 M.L.J. 624: I.L.R. 37 Cal. 885: L.R. 37 I.A. 147 (P.C.).

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Jagadindra's case must be read in the light of the later decision in *Damodar's case*,[1] where it was held that adverse possession affects the right and interest of the idol as well as the right and interest of the *shebait* and in my opinion where adverse possession is proved, time will also run against the idol even in circumstances such as those obtaining in the present case where no *shebait* has been appointed."

It seems to me that this view is in consonance with the view expressed in *Mahadeo Prasad Singh* v. *Karia Bharthi*,[2] and *Mahanth Ram Charan Das* v. *Naurangi Lal*,[3] cases where their Lordships express the view that adverse possession runs against the Mutt. The legislature must therefore be deemed to have given expression to this view in enacting the third column of Art. 134-B.

I shall now advert to some cases on which the learned Advocate-General placed some reliance. *Palaniyandi Malavarayan* v. *Vadamalai Odayan*,[4] was referred to. There the learned Judges were construing Art. 120 of the Limitation Act. Sundara Aiyar, J., in delivering the leading judgment observed at page 724 thus:

"Proceeding on the footing that Art. 120 would be applicable to bar the right to an office which is not claimed as hereditary, what is the starting point of limitation in such a case? Art. 120 states that it is "when the right to sue accrues." In the case of a suit for an office, the starting point must be taken to be, by analogy to S. 124, 'when the defendant takes possession of the office adversely to the plaintiff'. The possession of the office must therefore be adverse to the plaintiff. . . . There was no trustee from 1901 when the defendant's possession commenced till the date of the plaintiff's appointment in 1907. There was no one during that time who was competent, by virtue of his legal right to the office of trustee, to claim it from the defendants, who were in possession of it."

This case therefore proceeds upon the construction of the word 'right to sue' which has been interpreted as synonymous with the accrual of the cause of action. *Manikkam Pillai* v. *Thanikachalam Pillai*,[5] also proceeds on the same principles. The decision in *Subbiah Thevar* v. *Samiappa Mudaliar*,[6] is again a decision on Art. 120 as will be seen from the observations of my Lord the Chief Justice at page 596.

The learned Advocate-General lastly contended that the first and third columns of Art. 134-B must be read together and if so read, the article would not apply in the case of a manager who is not in existence on the date of the death of the previous manager. Once again, giving the language of those columns its plain meaning they only mean that when a manager brings a suit, the limitation will have to be reckoned from the dates prescribed in the third column. If the manager is in existence, he will have twelve years to sue from

1. (1910) 20 M.L.J. 624: I.L.R. 37 Cal. 885: L.R. 37 I.A. 147.
2. (1934) 68 M.L.J. 499: I.L.R. 57 All. 159: L.R. 62 I.A. 47 (P.C.).
3. (1933) 64 M.L.J. 505: I.L.R. 12 Pat. 251: L.R. 60 I.A. 124 (P.C.).
4. (1915) 2 L.W. 723.
5. (1916) 4 L.W. 369.
6. (1938) 1 M.L.J. 334: I.L.R. 1938 Mad. 586 (F.B.).

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the date of the death of the previous manager; if the manager comes into existence later, he will probably have less period of limitation but nevertheless the time is to be reckoned from the date fixed in the third column.

I may notice that Mr. Govinda Menon who followed the learned Advocate-General in response to a question from me frankly conceded that he could not invoke the aid of S. 6 of the Limitation Act and the learned Advocate-General who argued in reply to the arguments on behalf of the respondents did not rely on it. Obviously they could not do so. It is not enough that the plaintiff was in existence on the date of Subramania's death, the date from which the period of limitation has to be reckoned; he must have been manager as well. To use the language of the Privy Council in *Rano Dip Singh* v. *Parmeshwar Pershad*,[1] he must be a person entitled to institute a suit at the time from which the period of limitation has to be reckoned. The plaintiff was not such a person.

It would therefore seem to me that Art. 134-B would apply to the case and the plaintiff's suit would be barred by limitation. As my learned brother feels considerable doubt about the applicability of Art. 134-B and is inclined to take a different view and as I am not quite sure that even if Art. 144 applies, the suit would be within time, the question not being free from doubt having regard to the recent decisions of the Privy Council, I think it desirable that the following questions should be decided by a Full Bench in view of their importance:

1. Where a manager of a Hindu religious institution makes an alienation of the property of the institution for valuable consideration and the succeeding manager seeks to impeach that alienation by suit, will Art. 143-B apply when there is an interval of time between the death, resignation or removal of the previous manager and the election or appointment of the subsequent manager?

2. If such succeeding manager happens to be a minor at the date of his election or appointment, will he be entitled to the benefit of S. 6 of the Limitation Act?

3. If Art. 144 be held applicable to the case, when does adverse possession commence; is it from the date of the election or appointment of the succeeding manager or from the date of the death, resignation or removal of the previous manager who effected the alienation?

I direct that the papers be placed before my Lord the Chief Justice.

Abdur Rahman. J.

Abdur Rahman, J.—The only question which we have been invited to decide in this appeal is, as observed by my learned brother, that of limitation. But before I discuss the question, I may state a few more relevant facts.

Sivasubramania, who was a Matathipathi of a Saivite Mutt, died on the 15th July, 1918. He had no successor at the time of his

1. (1924) 48 M.L.J. 29: I.L.R. 47 All. 165: L.R. 52 I.A. 69 (P.C.).

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death but the plaintiff was appointed to take his place by the sishyas (disciples) on the 7th June, 1922. The plaintiff was then a minor and attained majority only on the 16th May, 1931. He instituted two suits subsequently out of which these appeals arise. O.S. No. 136 of 1934, was instituted on the 12th April, 1934, while O.S. No. 180 of 1934, was instituted on the 26th June, 1934, the day on which the Court re-opened after the summer recess of eight weeks. Both of these suits were for the recovery of possession of property alleged to have been alienated without any necessity or justification by the plaintiff's predecessor in office, Sivasubramania. One of the suits was thus instituted within three years of the date on which the plaintiff attained his majority while the second suit was brought after three years, yet on the day on which the Court reopened the plaintiff having attained majority sometime during the vacation. These suits were brought within twelve years of the plaintiff's election or nomination to the office of matathipathi, but more than twelve years after Sivasubramania's death.

The arguments in this case have centred round the applicability of Art. 134-B and Art. 144 of the Limitation Act and that is the point which has been discussed very elaborately by my learned brother. But if Art. 134-B be assumed to apply to the plaintiff although he was not the manager on the date on which Sivasubramania died, it is only because retrospective effect is being given to the section. The argument is that the period of limitation began to run on Sivasubramania's death and that it continued to run until it was barred irrespective of the fact that the person who could have fulfilled the qualification stated in col. 1 of Art. 134-B was not elected or nominated until 4 years after Sivasubramania's death. The existence or non-existence of a manager of a religious or charitable endowment during the twelve years after the death, resignation or removal of the manager who had alienated the property is, according to the learned counsel for the respondent, immaterial as long as a suit is instituted by a person who falls within the purview of col. 1 of the article. It is not quite easy to see how the provisions of this article of the Limitation Act can be said to be attracted when a manager was not in existence at the time of Sivasubramania's death unless by the introduction of a fiction the manager although appointed after the death, resignation or removal of the person who had effected the disputed alienations is assumed to have existed even during the period that he was not so appointed. This seems to be the only method by which the criticism that limitation would otherwise be running so to say *in vacuo* and not against the person described in the first column of Art. 134-B from the date mentioned in the 3rd column of that article may be avoided.

But if that assumption be justified, there is no reason why the same be not made under S. 6 of the Limitation Act and why that section should not be held to help the plaintiff who was a minor both

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on the dates on which he became entitled to institute the present suits and at the time from which the period of limitation is, according to my esteemed brother, to be reckoned under Art. 134-B of the Limitation Act. The relevant portion of S. 6 of the Limitation Act reads as follows:

"Where a person entitled to institute a suit . . . is at the time from which the period of limitation is to be reckoned a minor . . . he may institute the suit . . . within the same period after the disability has ceased as otherwise would have been allowed by the time prescribed in the third column of the said schedule."

Section 8 of the Limitation Act restricted the concession granted in S. 6 to a period of not more than three years from the cessation of the disability. This does not, however, stand in the plaintiff's way as one of the suits was instituted within that period and the other although a little after that period is covered by S. 4 of the Limitation Act. I am aware of the interpretation placed by their Lordships of the Judicial Committee on S. 6 of the Limitation Act in *Ranodip Singh* v. *Parmeshwar Pershad*,[1] where it was held that the extended period under that section can be availed of by a person who was in existence and "entitled to institute the suit at the time from which the period of limitation is to be reckoned." But in the absence of any evidence on the record that any other person or persons were in possession of the property belonging to the math after Sivasubramania's death, there is no reason why the representation of the math by the plaintiff be not held to be continuous and his appointment not to relate back to the time when the previous manager ceased to exist. In *Prosunno Kumari Debya* v. *Golab Chand Baboo*,[2] which came up for consideration before their Lordships of the Judicial Committee the point arose for consideration whether certain judgments and decrees passed against a previous shebait were not binding on his successor, it was held that they were and this because 'succeeding shebaits' were held to 'form a continuing representation of the idol's property'. A Matathipathi's office of a Saivite temple may similarly be held to be continuous and even if it is not filled in for sometime, it must be, to retain the continuity in representation, held to have been filled later only from the date when it was vacated. If this is correct, the present plaintiff although appointed four years after Sivasubramania's death should yet be held to have been appointed as from the date on which Sivasubramania died and should thus be held to fulfil that capacity both at the time of the institution of the present suit and at the time from which the period of limitation is to be reckoned. Since the plaintiff was admittedly a minor at the time when Sivasubramania died, he would in my opinion thus get the benefit of S. 6 of the Limitation Act.

As for the question whether Art. 134-B would apply to the facts of the present case, with very great deference to my esteemed

1. (1924) 48 M.L.J. 29: L.R. 52 I.A. 69: I.L.R. 47 All. 165.
2. (1875) L.R. 2 I.A. 145: 14 Beng.L.R. 450 (P.C.).

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brother, I am of opinion that we would not be justified in applying it simply because we find that the present suits were instituted by the manager of a Hindu religious or charitable endowment to recover possession of immovable property comprised in the endowment which has been transferred by a previous manager for valuable consideration. My chief difficulty for not falling in with my learned brother's view is that the construction which he proposes to place on that article would make its application retrospective. Since no manager of the property vesting in the mutt was in existence on the date mentioned in the third column of the article, that is the death of the transferor, no person could be, it must be conceded, entitled to institute the suit under this article on that date. If this article of the Limitation Act were not applicable on the 16th July, 1918, that is the day after Sivasubramania's death and could not be held to be applicable till the 6th June, 1922, why should it be held to apply on the plaintiff's nomination on the following day? What would have happened if there would have been no election or nomination, say for 13 years, that is, till about the time when the plaintiff attained his majority? If Art. 134-B were held to be applicable although no manager was in existence for 12 years after the transferring manager's death, we would have to hold that the suit for the recovery of possession of immovable property belonging to the charitable or religious endowment would be barred by limitation before a manager was elected or appointed to function as such. It must not be overlooked that Art. 134-B applies to a suit by manager. The suggestion made to us during the course of the arguments by the learned counsel for the respondent that a suit could have been instituted by the sishyas or by the Advocate-General during the period when none was acting as a manager is to my mind beside the point. A suit by these gentlemen might have been competent but it could not be held to fall within the ambit of Art. 134-B.

It is unnecessary for me to enter into the controversy whether the word 'manager' is necessarily confined to a *de jure* manager only. I am quite prepared to concede that a *de facto* manager of a religious or charitable endowment, even when he does not happen to be a *de jure* manager would be governed by this article when he institutes a suit for the recovery of immovable property. This is because the word 'manager' in the first column of Art. 134-B is not qualified by any such prefix as *de jure* or *de facto*. The managers either *de jure* or *de facto* stand in the same position as far as their liabilities to the trust are concerned. But to infer from the absence of any such distinction that the succession of a *de jure* manager to his office or the time when he succeeds cannot for that reason be a material circumstance in ascertaining the starting point of limitation is not, if I may say so with great deference, correct. A *de facto* manager cannot be said to succeed at all. He merely assumes certain duties and is consequently liable to discharge them as best as he can in the interest of the trust whose property he has under his control. It is

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only a *de jure* manager who can be elected or appointed to succeed to a previous *de jure* manager. The succession in the case of the latter would be equivalent to the assumption of control by the former. But as observed by me in another connection there is no evidence in this case of any manager either *de jure* or *de facto* functioning as such or being in possession of the Mutt or its properties before the plaintiff was elected or, in fact before he attained his majority. There being thus no *de facto* manager and *de jure* manager having succeeded in June, 1922 only, it seems to be difficult to apply Art. 134-B to this suit.

Nor was I struck by the argument that if I give effect to the view that the present manager had a right to bring a suit after his appointment under some other article of the Limitation Act, it would virtually mean that a second manager would, after the first manager's death, be entitled to claim a fresh lease of twelve years for the institution of the suit. The reply to that contention would be that once the period of limitation has begun to run, the death or removal of that manager would not by itself prevent the period of limitation from running.

Mr. Sitarama Rao's main contention was that the suit was really brought by the institution, *i.e.*, the Mutt and if the suit was by the Mutt, the period of limitation must be held to have started on the date of Sivasubramania's death. It might be observed in this connection that the suit by the institution or the Mutt would not first of all be governed by Art. 134-B and secondly that the Mutt could not bring a suit itself. The right of suit vests, as held by Sir Arthur Wilson in *Jagadindra Nath Roy* v. *Hemanta Kumari Debi*,[1] in the passage quoted by my learned brother, in the shebait and not in the idol. It is true that the idol is a juristic entity and is thus capable of suing, but *ex-necessitate rei* it cannot bring a suit itself and some person will have to speak or act on its behalf. The person who would act on behalf of the idol would be its shebait or manager. It may be that limitation may, if he is in existence, run against him in a representative capacity so as not only to debar him from suing for possession himself—if he had any individual rights as well in the property—but also against the idol or the Mutt which he represented. It is only in that sense that I take the decisions of their Lordships of the Privy Council in *Mahadeo Prasad Singh* v. *Karia Bharti*[2] and *Mahanth Ram Charan Das* v. *Naurangi Lal*.[3] The idols and Mutts may exist without shebaits or managers but they can only be represented by shebaits or managers and the existence of such a manager is a *sine qua non* for the applicability of

1. (1904) I.L.R. 32 Cal. 129: L.R. 31 I.A. 203 (P.C.).
2. (1934) 68 M.L.J. 499: L.R. 62 I.A. 47: I.L.R. 57 All. 159 (P.C.).
3. (1933) 64 M.L.J. 505: L.R. 60 I.A. 124: I.L.R. 12 Pat. 251 (P.C.).

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Art. 134-B. In the absence of any manager between 1918 and 1922, it would not be easy, in my opinion, to apply this article.

It may not be out of place here to refer to *Rangayya Appa Rao* v. *Sriramulu*,[1] in which their Lordships of the Privy Council, when called upon to construe Art. 110 of the Limitation Act, held that the words 'arrears of rent' in that article meant 'arrears of ascertained rent which the tenant is under obligation to pay and which the landlord can claim and if necessary sue for' and that the period of limitation for the recovery of such arrears would start not from the close of the fasli year for which the arrears of rent were payable but from the date of the final decree which was necessary for the landlord to obtain under the Madras Act, VIII of 1865, to have the proper rate of rent ascertained. In deciding the above appeal, their Lordships of the Judicial Committee observed as follows:

> "The object of a Limitation Act is presumably to compel people to sue upon them with due promptitude or to forfeit the right to do so at all. In such an act the falling due of rent naturally means the falling due of an ascertained rent which the tenant is under an obligation to pay and which the landlord can claim and *if necessary sue for*."

This decision was arrived at as it was held that if the arrears of rent were held to be due at the end of each fasli year, limitation would be running against the landlord during the pendency of the suit brought by him for the determination of the rate of rent and the result would be that the suit would be barred although the plaintiff was not in a position to say what rent was actually due.

If Art. 110 was construed by their Lordships in that manner and for that reason, how can Art. 134-B be construed to apply to a period when no manager who was capable of bringing a suit or of forfeiting his right to do so was in existence? The Full Bench decision in *Subbiah Thevar* v. *Samiappa Mudaliar*,[2] lends support to the argument that a right of action on the ground of breach of trust against a trustee would remain in abeyance until a new trustee was appointed who is competent to sue in this behalf. It is true that in that case the Full Bench was dealing with Art. 120 of the Limitation Act but no distinction can be drawn, in my opinion, on that ground as Art. 120 provides generally that the period of limitation would start when the right to sue accrues while Art. 134-B lays down more specifically as to when the right to sue would be said to accrue in cases covered by that article.

In short according to my reading of Art. 134-B of the Limitation Act there must be, if the article is to apply, a person capable of suing as manager either *de facto* or *de jure* of a religious or charitable endowment who may be able to recover possession on its

1. (1903) 14 M.L.J. 1: L.R. 31 I.A. 17: I.L.R. 27 Mad. 143 (P.C.).
2. (1938) 1 M.L.J. 334: I.L.R. 1938 Mad. 586 (F.B.).

behalf as soon as the previous manager dies, resigns, or is removed from his office. If there is no such manager on the date on which the previous manager was deprived of his office, Art. 134-B would have no application to that case. To such a case Art. 144 of the Limitation Act, in the absence of any other specific article would be applicable and since adverse possession had according to that article to run against the plaintiff for the statutory period and the suits were instituted within 12 years of his appointment and in any case within three years of his attaining majority, they must be held to be within time.

As the questions involved in the case are of considerable difficulty, I agree to the order of reference to the Full Bench.

(These appeals came on for hearing before the Full Bench, in pursuauce of the above Order of Reference.)

The Court expressed the following

OPINIONS.

Leach, C.J.

The Chief Justice.—This Full Bench has been constituted to decide the following questions:

"(1) Where a manager of a Hindu religious institution makes an alienation of the property of the institution for valuable consideration and the succeeding manager seeks to impeach that alienation by suit, will Art. 134-B apply when there is an interval of time between the death, resignation or removal of the previous manager and the election or appointment of the subsequent manager?

(2) If such succeeding manager happens to be a minor at the date of his election or appointment, will he be entitled to the benefit of S. 6 of the Limitation Act?

(3) If Art. 144 be held applicable to the case, when does adverse possession commence? Is it from the date of the election or appointment of the succeeding manager or from the date of the death, resignation or removal of the previous manager who effected the alienation?"

The reference arises out of Appeal No. 26 of 1937, which was preferred from a decree of the Subordinate Judge of Coimbatore. The suit was instituted by the Mahant, or Matathipathi, of the Perur Math to recover possession of certain immovable properties belonging to the math which had been alienated by his immediate predecessor, one Sivasubramania Swamigal. The last alienation took place in 1910. Sivasubramania Swamigal died on the 15th July, 1918, and the suit was not instituted until the 12th April, 1934. The appointment to the office of mahant rests with the disciples of the math, but they did not appoint a successor to Sivasubramania Swamigal until the 7th June, 1922, nearly four years after his death. The defendants raised the plea that the suit was barred by limitation,

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their contention being that Art. 134-B of the Limitation Act applied. The plaintiff maintained that the appropriate article was Art. 144 and that time only began to run from the date of his appointment. He was a minor at the time of his appointment and did not attain his majority until the 6th May, 1931. It was in these circumstances that it was said that S. 6 of the Limitation Act had application. The Subordinate Judge decided against the plaintiff and he appealed to this Court. The appeal came before Venkataramana Rao and Abdur Rahman, JJ., who were inclined to take different views on the question of limitation and both have set forward their reasons for making this reference. They have discussed all relevant authorities and an elaborate examination of them is not called for. It will be sufficient to examine the questions which arise and to refer merely to the governing factors.

Art. 134-B which falls in Part VIII of the Schedule to the Limitation Act states that the period of limitation for a suit by the manager of a Hindu, Mahomedan or Buddhist religious or charitable endowment to recover possession of immovable property comprised in the endowment which has been transferred by a previous manager for a valuable consideration shall be twelve years and that time shall begin to run from the death, resignation or removal of the transferor. Art. 144 is the residuary article in Part VIII of the Schedule. It prescribes a period of twelve years for a suit for the possession of immovable property or any interest therein not otherwise specially provided for in the Act, the period of limitation starting from the time when the possession of the defendant becomes adverse to the plaintiff. Art. 134-B was inserted in the Limitation Act by the amending Act of 1929. It is accepted by both sides that the object of its insertion was to put an end to judicial conflict. The conflict was whether in a suit by a manager of a math for possession of immovable property belonging to the endowment which had been transferred by his predecessor time began to run from the date of the alienation or from the date of the death of the alienor. By inserting Art. 134-B the Legislature has made the starting point the death, resignation or removal from office of the transferor. Independent of the amendment of the statute the Privy Council in 1933 in its judgment in *Mahant Ram Charan Das* v. *Naurangi Lal*[1] also decided that this should be

1. (1933) 64 M.L.J. 505: L.R. 60 I.A. 124: I.L.R. 12 Pat. 251 (P.C.).

the starting point. There the Privy Council held that where a mahant has alienated math property the possession of the alienee does not become adverse during the tenure of office of the mahant and limitation only begins to run from the time when the mahant ceases to hold office. The question was whether Art. 134 or Art. 144 applied and the decision was that the proper article was Art. 144. The appeal in *Mahant Ram Charan Das* v. *Naurangi Lal*[1] was heard after the amendment of the Act in 1929, but the suit had been instituted before the amendment and therefore Art. 134-B had no application. A mahant is not a trustee in the English sense, as was pointed out by the Judicial Committee in *Vidya Varuthi* v. *Balusami Aiyar*[2]. He has the right to the enjoyment of the properties during his lifetime, subject, of course, to the necessities of the math, and that is why in that case and in *Mahant Ram Charan Das* v. *Naurangi Lal*[1], the Privy Council held that the starting point of limitation was the date when the mahant vacated the office, and no doubt similar considerations operated when the Legislature decided to insert Art. 134-B in the Limitation Act.

On the face of it Art. 134-B applies to a case like the present one. This is a suit by the manager of a Hindu religious endowment to recover possession of immovable properties comprised in the endowments which were alienated by his predecessor for valuable consideration and the starting point of the period of twelve years is the date of the death of his predecessor. It is contended, however, that the Legislature only intended the article to apply in a case where the full period of limitation could run. In other words, unless the terms of the endowment provide for immediate succession on the death of the mahant responsible for the alienation the article cannot apply. In answer to a question put to him in the course of the arguments, Mr. Govinda Menon, on behalf of the appellant, said that the article would have application in this case if the disciples had elected a successor to Sivasubramania Swamigal as soon as the breath left his body, but if they delayed for a moment Art. 134-B would not apply and the case would be governed by the residuary article, namely Art. 144. This is going to great lengths and to lengths which I certainly am not prepared to go. When the Legislature places upon the statute

1. (1933) 64 M.L.J. 505: L.R. 60 I.A. 124: I.L.R. 12 Pat. 251 (P.C.).
2. (1921) 41 M.L.J. 346: L.R. 48 I.A. 302: I.L.R. 44 Mad. 831 (P.C.).

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book a provision in terms which are entirely without ambiguity, as is the case here, it is the duty of the Court to give effect to the provision.

The argument for ignoring Art. 134-B is that it is a general principle of the law of limitation that limitation can only be deemed to run from the date when the cause of action accrues, and a cause of action cannot exist unless there is a person capable of suing. Granted that this is so it does not mean that the Legislature cannot make an arbitrary starting point, irrespective of whether there is a person capable of suing or not. It is to be observed that there is a vast difference between the wording of Art. 134-B and Art. 120. Under Art. 120 the period of limitation commences when the right to sue accrues, which is plainly not the case so far as Art. 134-B is concerned, where the starting point is definitely from the date on which the manager of the endowment ceases to hold office. As Venkataramana Rao, J., has been at pains to point out in his referring order the Legislature has made an arbitrary starting point, and I agree with him. In my opinion there is here no room for the application of any principle, which, if applied, would mean the overruling of the plain words of the statute. What is so often lost sight of is that the plain words of a statute must be given effect to, unless by doing so it is obvious that it would lead to an absurdity. That is not the position here. Moreover, the Privy Council has itself pointed out that equitable considerations are out of place when construing the Limitation Act and the strict grammatical meaning of the words is the only safe guide—*Nagendra Nath De* v. *Suresh Chandra De*[1]. And that case was concerned with the interpretation of Art. 182 of the Limitation Act.

In considering whether Art. 134-B or Art, 144 applies in this case we have two important factors. The first is that the Legislature intended to make the starting point of limitation the death, resignation or removal from office of the mahant responsible for the alienation and that irrespective of the statute the Privy Council has laid down the same rule. The second is that there can be no equitable construction of the Limitation Act and effect must be given to the plain meaning of the words used. If these factors are borne in mind it seems to me that all

1. (1932) 63 M.L.J. 329: L.R. 59 I.A. 283: I.L.R. 60 Cal. 1 (P.C.).

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difficulties disappear, and Art. 134-B is the only Article which can be applied. The contention that this will cut down the period of limitation, if there is not an automatic appointment of a successor to the mahant responsible for the alienation is really beside the point. The Legislature could not be expected to legislate in this connection for a situation where those responsible for the appointment of a successor choose to neglect their duty. If they do so theirs must be the responsibility. In the present case the disciples of Sivasubramania Swamigal could have elected his successor immediately after his death had they so desired. Because they neglected their duty in this respect the Court, in my opinion, is certainly not called upon to ignore the very emphatic words of Art. 134-B and allocate the case to a category to which it does not belong. I agree entirely with the observations of my learned brother Venkataramana Rao. J., on this question, and consequently the answer which I would give to the first question is in the affirmative.

The answer which I would give to the third question has been indicated in what I have already said in discussing the first question under reference. In view of the decision of the Privy Council in *Mahant Ram Charan Das* v. *Naurangi Lal*[1], it appears to me that even if Art. 144 does apply the date of the starting point of adverse possession is the date of the death, resignation or removal of the manager who effected the alienation, and not the date of the election or the appointment of his successor. Art. 144 says that the period of limitation shall start from the date when the possession of the defendant becomes adverse to the plaintiff and in a case like the present one, the Judicial Committee has declared that adverse possession starts from the death, resignation or removal of the mahant responsible for the alienation. Therefore the answer I would give to the third question is that even if Art. 144 be applicable adverse possession started to run from the death of Sivasubramania Swamigal.

The second question does not call for much discussion. It has been said on behalf of the appellant that his appointment to succeed Sivasubramania Swamigal should be deemed to date back to the latter's death, in which case the appellant would be entitled to the benefit of S. 6 of the Limitation Act. If his appointment were to be deemed to date back to that period

1. (1933) 64 M.L.J. 505: L.R. 60 I A. 124: I.L.R. 12 Pat. 251 (P.C.),

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there is no doubt that the suit would be in time, but unfortunately for the appellant's argument here there is no warrant that the appointment should be deemed to be antedated. It was made on the 7th June, 1922, and there is nothing in the Limitation Act or in any other enactment which gives it retrospective effect. The argument that it should be given this effect is one which has only to be stated to be rejected. When the appellant was appointed the period of limitation had started to run. It had in fact been running for nearly four years and once having started nothing could stop it. My answer to the second question is that if the appellant's appointment had automatically followed Sivasubramania Swamigal's death, the appellant being a minor would have been entitled to the benefit of S. 6, but inasmuch as his appointment was made after the period of limitation had started to run the section does not help him.

The costs of this reference I would make costs in the cause.

Venkataramana Rao, J.

Venkataramana Rao, J.—I agree.

Horwill, J.

Horwill, J.—I agree.

Abdur Rahman, J.

Abdur Rahman, J.—Nothing was said by learned counsel for the respondent before the Full Bench that may induce me to alter my opinion. It is not difficult to follow the interpretation placed by him on Art. 134-B of the Indian Limitation Act. It is too simple in fact not to be understood and that in my judgment is about its only merit. Had it not led to a great injustice in a given set of circumstances, it would not have been difficult to agree with him. But an apprehension of the consequences that would result from that interpretation led me to examine the language of the Article more closely in order to ascertain whether it was the only construction, as claimed on behalf of the respondent, that could be put on the language of the Article or whether the Article was meant, if properly understood, to apply to a different and perhaps a limited class of cases but not to cases such as the present one.

When the language of the Article is plain, the task of a Judge is easy. He has to concentrate on the words used in the statute and to give them their plain and ordinary meaning. This is what is meant by a literal or a grammatical construction. Since there is no ambiguity in the words or phrases used in the Article that we are called upon to construe, it is unnecessary to

consider the circumstances when it would have been permissible to depart from that method of construction. It is our duty in this case to give full effect to the words as they appear in the statute without altering their sense or meaning with the variation of circumstances or facts and decide whether the Article can be made applicable to the present case.

To come to Art. 134-B. It declares that a suit by 'the manager of a Hindu etc., religious or charitable endowment to recover possession of the immovable property comprised in the endowment which has been transferred by a previous manager for valuable consideration' may be instituted within "twelve years" from "the death, resignation or removal of the transferor".

Since the word 'manager' has been used in juxtaposition with the words 'previous manager' in the same column, it may be safely inferred that the legislature, by employing the word manager, intended to convey 'the following or succeeding manager' regardless of the fact whether the latter manager was *de jure* or *de facto*. A suit, to attract this Article, has to be instituted by a manager alone and by none else. If brought on behalf of a religious or a charitable endowment, such as a math is, through any one else, it would not fall within the scope of this Article. The period of limitation provided for a suit which falls within its period is twelve years. The manager must, therefore, have twelve years from the event specified in the third column. He can have no more and should have, according to me, no less. If we are obliged to give a lesser period to a manager under any set of circumstances for a suit covered by this Article, we are committing an inroad which is not, in my opinion, justifiable. Are we entitled to interpret the Article in such a way as would lead to the curtailment or abridgment of the period of limitation provided in the second column? My learned brother, Venkataramana Rao, J., foresaw this difficulty and felt that it could not be helped. But, is that the correct method of interpretation? Would it be right for us to construe the Article in such a way as to reduce the prescribed period of limitation? I submit not. It may be said, however, that the suit has to be brought within 12 years of the occurrence of the event mentioned in the third column and this period is not reduced. This is undisputed and in fact, indisputable. By whom then is the question? and the answer can only be, by the

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manager. But if no manager was in existence on the date when the event mentioned in the third column occurred, how could he be said to have the period prescribed by this Article? Art. 134-B could not be obviously applied to an alienation made by a previous manager if the following or succeeding manager was not in existence for a period of twelve years after the death, resignation or removal of the former (*i.e.*, the last manager). Two methods of treatment were possible in the circumstances, one of which was suggested by my learned brother and is now adopted by the majority of the Full Bench and the other which I ventured to propose. According to the view taken by the majority, limitation must be held to have started whether the person answering to the description given in the first column was in existence or not at the time when any of the events mentioned in the third column occurred and the article according to them, should be applied to any suit instituted by a person of that description regardless of the fact whether that person would get the full or even any period provided for by the section or not. This is the first method. The second method is to hold that this Article should be held to be inapplicable, unless the manager was in existence on the date from which the prescribed period of limitation was to run. This would limit the application of this Article only to that class of cases where the following or succeeding manager was brought into existence as in cases of hereditary succession or by nomination or election either prior to or on the day when 'the previous manager' died, resigned or was removed. As this interpretation would entail in some cases, if the Article is to be held applicable, the necessity of nominating or appointing a manager on the very day on which the previous manager might have died and when his corpse might have been, as suggested at the hearing, lying to be disposed of or even when his ashes had not even grown cold, it was characterised by my Lord the Chief Justice as astounding. But with very great deference to him, I see nothing so startling in it. We are asked to find whether Art. 134-B would apply in these circumstances. He and those of my learned brothers who agree with him are prepared to give the answer in the affirmative. I am, in all humility, of a contrary opinion. According to me, this Article can be held to apply only to those cases where a manager was in existence on the date on which one of the events mentioned in the third column occurred. This,

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to my mind, is the only way, in which an inroad on the first or the second column of the Article can be avoided. This is the only manner, in my opinion, in which limitation can be saved from running, so to say, *in vacuo*. There is no other method of treatment, I submit and I say so with very great deference, which is logical and brings out the ordinary meaning of every word in Art. 134-B.

If Art. 134-B is held to be inapplicable to a case such as the present one, the only other Article that would apply is Art. 144. This necessitates the determination of the time when the period of limitation is to start and has led my learned brother to formulate the third question in his order of reference. The decision of this question again bristles, on account of the various decisions of the Privy Council, with difficulties. The argument advanced by learned counsel for the respondent was that inasmuch as the math was the real plaintiff and the manager, who was a minor in this case on the date of his appointment, was only an agent or guardian on its behalf—the adverse possession should be held, under Art. 144 to start from the date when the possession of the defendant became adverse to the plaintiff, that is, to the math and not to the manager who is suing on its behalf. This is claimed to be in accordance with the grammatical construction of the words of that Article and the question to decide is whether the contention is, although quite plausible, sound. The first difficulty that one encounters in agreeing with this interpretation is that the period of adverse possession would have to be held to start from the very date on which the alienation was effected by the 'previous manager'; and if he happened to live beyond the statutory period of twelve years, the alienee's title to the property would be held to be completed—although the alienation might not have been of the math itself or did not purport to have been made adversely to the math. This cannot be denied that in view of the decisions of their Lordships of the Privy Council and of Courts in India, limitation in the two cases mentioned in the preceding sentence would start on the date of the alienation. See *Damodar Das* v. *Lakhan Das*[1], *Mahant Ram Charan Das* v. *Naurangi Lal*[2], *Subbiah Pandaram* v. *Mahomed Mustapha Maracayar*[3], *Deben-*

1. (1910) 20 M.L.J. 624: L.R. 37 I.A. 147: I.L.R. 37 Cal. 885 (P.C.).
2. (1933) 64 M.L.J. 505: L.R. 60 I.A. 124: I.L.R. 12 Pat. 251 (P.C.).
3. (1923) 45 M.L.J. 588: L.R. 50 I.A. 295: I.L.R. 46 Mad. 751.

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dra v. *Nhaharmal*[1], and *Alam Khan Sahib* v. *Karuppanaswami Nadar*[2]. But the same cannot be said of cases where a manager has alienated the property for the apparent necessity of the math although it is subsequently found to have been made in excess of his powers and for his private needs alone. In such cases, it has been held by their Lordships that the period of limitation would start from the date when the manager who effected the alienation died or ceased to function. It was pointed out by their Lordships in *Mahant Ram Charan Das's case*[3]:

> "The operation of the proposed grant is effective and endures only for the period during which the mahanth had power to create an interest in the property of the math."

Mahant Rampal Das who had in the first instance granted a permanent lease of certain lands in December, 1909, to Naurangi Lal and conveyed them later to Mt. Sampat Kaur in February, 1911, died in or about July, 1913. A suit for the recovery of possession by a succeeding chela brought in May, 1924, was not held to be barred by limitation under Art. 144 and the decision of the High Court of Patna holding that the period of limitation ran from the date of alienation was reversed as the mahanth was held to be:

> "at liberty to dispose of the property of a math during the period of his life and that grant purporting to be for a longer period,"

was held to be 'good to the extent of the mahanth's life interest'. See also *Vidya Varuthi* v. *Balusami Aiyar*[4], *Subbiah Pandaram* v. *Md. Mustapha Maracayar*[5]. But the argument now put forward on behalf of the respondent would go against these decisions. If the math is the real plaintiff, there would be no justification for holding that the limitation is to remain suspended during the period that the alienating manager continued to function as such. This would bring us in conflict with the Privy Council decisions and the principle that although a juristic personality and thus capable of holding the property in the legal sense, a math is unable to know or capable of taking any action itself for protecting its rights.

There are two lines of cases which must be reconciled if this conflict has to be avoided. There are cases such as

1. A.I.R. 1930 Cal. 673 at 677. 2. (1938) 1 M.L.J. 113.
3. (1933) 64 M.L.J. 505: L.R. 60 I.A. 124: I.L.R. 12 Pat. 251 (P.C.).
4. (1921) 41 M.L.J. 346: L.R. 48 I.A. 302: I.L.R. 44 Mad. 831 (P.C.).
5. (1923) 45 M.L.J. 588: L.R. 50 I.A. 295: I.L.R. 46 Mad. 751 (P.C.).

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Jagadindranath Ray v. *Hemanta Kumari Debi*[1], recently followed in the *Shaidganj Musjid's case*[2], where it was held by their Lordships that the right of suit vested in the manager alone or in other words, it was only the manager (be he *de facto* or *de jure*) who was entitled to intercede on behalf of the math and could speak or act on its behalf. The other line of cases is to the effect that temples and maths have juristic personalities and their property is not vested in their managers but in the idols or institutions. See *Jodhi Rai* v. *Basdeo Prasad*[3], *Pramathanath Mullick* v. *Pradyumna Kumar Mullick*[4] and the observations in *Ponnambala Desikar* v. *Periyannan Chetti*[5] and *Nagappa Chettiar* v. *Zamindar of Sivaganga*[6]. If this argument is adopted, limitation must be held to start from the date of the alienation irrespective of the non-existence or incapacity of the manager. But this contention was repelled by their Lordships in *Jagadindranath Ray* v. *Hemanta Kumari Debi*[1]. The facts of that case were that Jagadindranath Ray brought a suit for possession as shebait of an idol. It was found by the Courts in India that the dispossession on which the cause of action was based had taken place during the plaintiff's minority but the suit was brought within three years of his attaining majority. The trial Court had decreed the claim but the suit was dismissed by the High Court as barred by limitation on the ground that the title was in the Thakur and Braja Sundara Achi, who was the guardian of her minor adopted son, the shebait, could bring a suit during his minority on behalf of the Thakur. In other words, the *ratio decidendi* of their decision was that the limitation had started against the Thakur and the shebait's minority would not entitle him to bring a suit within three years of the attainment of his majority. This reasoning was not accepted by their Lordships in the following words:

> ". . . . . that the possession and management of the dedicated property belongs to the shebait. And this carries with it the right to bring whatever suits are necessary for the protection of the property. Every such right of suit is vested in the shebait, not in the idol."

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1. (1904) L.R. 31 I.A. 203: I.L.R. 32 Cal. 129 (P.C.).
2. (1940) 2 M.L.J. 903 at 913: L.R. 67 I.A. 251: I.L.R. 1940 Lah. 493 (P.C.).
3. (1911) I.L.R. 33 All. 735 (F.B.).
4. (1925) 49 M.L.J. 30: L.R. 52 I.A. 245: I.L.R. 52 Cal. 809 (P.C.).
5. (1936) 71 M.L.J. 105: L.R. 63 I.A. 261: I.L.R. 59 Mad. 809 at 819 (P.C.).
6. (1940) 1 M.L.J. 442: I.L.R. 1940 Mad. 858.

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The pronouncement of their Lordships is very clear. The fact that somebody else could bring a suit during the minority of the shebait was immaterial—the Thakur itself being *ex necessitate rei* unable to do so. It could only act through a human agency and that agency can be no other than that of a manager, whatever name be given to him and whether he be *de facto* or *de jure*. If limitation had started against the Thakur and the plaintiff was acting merely as an agent, as appears to be the contention in this Court, limitation would have run on irrespective of the plaintiff's minority and run out on the expiry of twelve years from the date of dispossession. But it was not so held. How could S. 6 of the Limitation Act be held to be applicable if the math were regarded to be independent and capable of acting without its manager? It was so held as the idol had no power to bring a suit except through the trustee who was a minor. What about Lord Buckmaster's observation then in *Subbaiya Pandaram* v. *Mohomed Mustapha Maracayar*[1], when referring to two earlier decisions in *Ishwar Shyam Chand Jiu* v. *Ram Kani Ghose*[2], and *Vidya Varuthi* v. *Balusami Aiyar*[3], which were decided under Art. 144, he observed that:

> "The statute would only run against him (the succeeding trustee) as from the time he assumed office."

It cannot be denied that it was a case of a specific trust and for that reason Art. 134 might have been, but for the transfer by the trustee not being voluntary, held applicable. It is true that their Lordships held that:

> "There was little difference in principle between a transfer under an adverse execution and a sale by the trustee himself;"

They however added:

> "But disregarding that Article (134), Art. 144 covers the exact case."

Since the limitation was held in that case to start from the 22nd March, 1898, that is, the date of the alienation, it may be said that the period under Art. 144 was, in spite of what their Lordships had observed before when referring to *Ishwar Shyam's* and *Vidya Vruthi's cases*, counted from the date of alienation. The answer to this apparent conflict is to be found in the fact that the vendee in that case

1. (1923) 45 M.L.J. 588: L.R. 50 I.A. 295; I.L.R. 46 Mad. 751 (P.C.).
2. (1910) 21 M.L.J. 1145: L.R. 38 I.A. 76: I.L.R. 38 Cal. 526 (P.C.).
3. (1921) 41 M.L.J. 346: L.R. 48 I.A. 302: I.L.R. 44 Mad. 831.

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had purchased the property in violation of the trust and he was, in virtue of the exception to S. 10 of the Limitation Act, held entitled to show in answer to the claim for the recovery of possession of trust property that he had bought it for valuable consideration and held it adversely. The vendee was found to have been within the terms of the exception and consequently not prevented from relying on the provisions of the statute which limit the time for the institution of the suits brought for recovery of possession. In so far as the alienation was in breach of specific trust, it was held to be void *ab initio*, as the transfer of the math would have been according to *Damodar Das's case*[1], and limitation was held to start from the date of alienation. The Matathipathi had, in the present case, on the other hand, liberty to dispose of the property during his life although the alienation made by him was only to the extent of his own life interest. It would follow, therefore, that possession during the last manager's life could not be adverse and that upon his death, it would run against the succeeding trustee, that is, the present plaintiff from the time that he assumed office with the extended period of limitation under S. 6 as he was a minor at the time from which the period of limitation was to be counted. It is interesting to observe that the passage quoted above from *Jagadindranath Ray's case*[2] including the sentence with reference to S. 144 was cited by Sir George Rankin in *Ponnambala Desikar* v. *Periyanan Chetti*[3] with approval.

Then there is the observation in *Ponnamabala's case*[3] (p. 821) that,

"the right of each successive manager to authorize, create or continue a new tenancy for the period of his managership must be taken in the case of a public temple or a family idol to be the same as in the case of a math,"

since it was held by their Lordships in the preceding page,

"that for the present purpose it is necessary to recognise any difference in the consequences which flow from a permanent lease or complete alienation of the debutter property in the case of a math or temple or family idol".

This observation can only be justified on the principle laid down in *Jagadindranath's case*[2] that the only person competent to act or sue on behalf of the math was the manager and limitation could not run against the math or temple unless it was also

1. (1910) 20 M.L.J. 624: L.R. 37 I.A. 147: I.L.R. 37 Cal. 885.
2. (1904) I.L.R. 32 Cal. 129: L.R. 31 I.A. 203 (P.C.).
3. (1936) 71 M.L.J. 105: L.R. 63 I.A. 261: I.L.R. 59 Mad. 809 (P.C.).

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running against the succeeding manager after the manager who had originally alienated the property ceased to function—and this not on account of

> "the notion of personal bar as regulating the validity or invalidity of the transaction"

but because,

> "the offence lies entirely in the unnecessarily great interest which has been parted with".

The manager like a Hindu widow, has power to act for his lifetime or during the period in which he holds the office; but the effect of his act beyond that period would depend on the validity of the necessity for the alienation in the interest of the math or the temple. If this is the correct principle, how can it be urged that the limitation would start against the math from the date of the alienation regardless of the existence of the succeeding manager, whether *de facto* or *de jure*, simply because a juristic personality has been held or recognised in an inanimate institution like a Mutt on account of religious custom of the Hindus? It may have a juridical status with the power of suing and liability of being sued; but it cannot be denied that it is an artificial person after all and is incapable of acting except through its manager. There are other decisions of this Court which have taken the same view. See *Manikkam Pillai* v. *Thanikachalam Pillai*[1], *Palaniyandi Malavarayan* v. *Vadamalai Odayan*[2], *Annamalai Desikar* v. *Govinda Rao*[3], *Ranga Dasan* v. *Latchuma Dasan*[4] and *Rao Bahadur Govinda Row* v. *Chinnathurai Pillai*[5].

The only method of reconciling the two lines of cases represented by *Jagadindranath's case*[6] on the one hand and *Pramathanath's case*[7] on the other thus is that while the property and the capacity to sue or being sued may be held to vest in a juristic person like an idol or the institution of a math, the right of action or suit on behalf of the math or the idol must be confined to the manager of these inanimate objects of worship or charity.

Three decisions were relied on by Mr. Sitarama Rao in support of his contention that adverse possession would

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1. (1916) 4 L.W. 369.
2. (1915) 2 L.W. 723.
3. (1923) 44 M.L.J 318: I.L.R. 46 Mad. 579.
4. (1924) 48 M.L.J. 114.
5. (1925) 49 M.L.J. 640.
6. (1904) I.L.R. 32 Cal. 129: L.R. 31 I.A. 203 (P.C.).
7. (1934) 49 M.L.J. 30: L.R. 52 I.A. 245: I.L.R. 52 Cal. 809.

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start against the math even if there is no manager at the time of the death of the alienating manager. The first decision was that of *Vithalbowa* v. *Narayana Dasji Thite*[1]. The facts of that case are that Krishnaji who was a manager of a math sold the miras tenure of certain lands appertaining to the math to one Baxarbai in 1860. Krishnaji died in that year and was succeeded by Ramakrishna as manager who sued Baxarbai in 1864 to set the sale aside but the suit was dismissed against him in the following year as he asserted to be a perpetual tenant under the sale and his right was confirmed. Gopal brought a suit against Ramakrishna subsequently asking for a declaration that he was the legal manager of the math. This was decreed in 1871 and Ramakrishna was ordered to be removed as he was held to have had no title to the office. The decree was confirmed by the High Court in 1875 and Ramakrishna removed in consequence. On a suit being brought by Gopal for possession of the property sold to Baxarbai in 1887, he was met with a plea of limitation by Baxarbai's alienee. This plea prevailed and if I may say so with respect, rightly. Ramakrishna was in possession of the math property between 1860 and 1875 and was a manager of the math *de facto* if not *de jure.* Sir Charles Sargent, C.J., who delivered the judgment observed,

"If the defendant's possession was adverse to the ownership of the math during the twelve years after Krishnaji's death, the operation of the Act cannot be affected by the circumstance that there was no *legal* manager of the math during that period".

In spite of the finding that the mirasdar in Inam estates in Bombay Presidency is a tenant at a quit rent or a reasonable rent not subject to ejectment as long as he pays it, it was held that since Baxarbai asserted his mirasi right in 1864 when he was sued by Ramakrishna and twelve years had passed from that day the plaintiff's right as representing the math to recover immediate possession was barred.

This decision does not support the contention advanced by learned counsel for the respondent. Ramakrishna who was the manager *de facto* in 1864 brought a suit against Baxarbai and failed. He continued to remain in possession till 1875 when he was followed or succeeded by Gopal. The mutt was thus being continuously represented by Ramakrishna and Gopal.

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1. (1893) I.L.R. 18 Bom. 507.

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The decision in the second case, the *Administrator-General of Bengal* v. *Balkissen Misser*[1] is not, with great deference to the learned Judge who decided that case, correct. While the learned Judge understood the effect of the decision in *Jagadindranath's case*[2] correctly, he overlooked the fact that *Damodar Das's case*[3] was a case in which the assignment was, being one of the math and its properties, void *ab initio* and passed no title with the result that the assignee's possession became adverse from the date of the assignment (3rd November, 1874) itself irrespective of the fact that the senior chela who had executed *ekrarnama* and transferred the math and its properties was living. This was how this decision was explained by their Lordships in *Mahant Ram Charan's case*[4]. *Damodar Das's case*[3] is no authority for the proposition that time will begin to run against the idol even when the shebait is not in existence. Nor is it possible I venture to submit, to institute a suit in the name of the idol in cases where a shebait is not appointed. There is very little analogy between a public Company and an idol although both of them, it must be conceded, are clothed with a juristic personality by law. Under the provisions of O. 29, of the Code of Civil Procedure, however, it is only a secretary, director or other principal officer, able to depose to the facts of the case, and none else who can sign and verify the statements in the pleadings as a shebait, Matathipathi or a manager can do on behalf of the idol or math and none else. To say that persons other than those that I have mentioned in the last sentence, by whatever name they may be called, can bring a suit on behalf of the idol or math in their names where they are not appointed or functioning as managers etc., is to go against the express decision of their Lordships in *Jagadindra's* case.

The third case was that of *Ponnambala Desikar* v. *Periyanan Chetti*[5]. The reflection in regard to this case that there was no manager between 1913 and 1917 is of no avail as Nataraja became a manager *de facto* in 1902 and continued to function as such until 1913 when he was removed by the High

1. (1924) I.L.R. 51 Cal. 953.
2. (1904) I.L.R. 32 Cal. 129: L.R. 31 I.A. 203 (P.C.).
3. (1910) 20 M.L.J. 624: L.R. 37 I.A. 147: I.L.R. 37 Cal. 885.
4. (1933) 64 M.L.J. 505: L.R. 60 I.A. 124: I.L.R. 12 Pat. 251.
5. (1936) 71 M.L.J. 105: L.R. 63 I.A. 261: I.L.R. 59 Mad. 809.

Court. If the period of limitation had once started, it could not be stopped by the subsequent removal of the manager. Moreover, the permanent cowle was in that case granted in 1865 and the conduct of the various managers showed that they had been recognising the transfer of the permanent cowle or lease as valid. In view of the existence of a manager *de facto*, the decision does not support the contention advanced by learned counsel for the respondent. If the alienee's possession during the lifetime of the previous manager was not adverse to the math (a proposition to which no exception is taken in this case) and if an idol or a math is incapable of bringing an action without the intervention of a human agency and if that agency is to be confined in law to a manager *de facto* or *de jure*, by whatever name he be called, it is to my mind, impossible to conceive that they (that is the idols or the maths) can be described to be the plaintiffs within the meaning of that word as used in Arts. 142 or 144 of the Indian Limitation Act. By using the word 'plaintiff' in either of these Articles, the Legislature obviously intended to convey a person who was in existence capable of taking action, although on account of a disability like minority (real and not fictional as an idol or a math is at times described), insanity or idiocy, he may not be able so to do during the period that he continues to suffer from the disability. To say that a cause of action has not arisen is one thing; to say that a cause of action, although it has arisen, is, on account of a disability suspended after it has arisen, another. Since the right to maintain a suit cannot be said to be hanging in the air and must necessarily vest in somebody as soon as it arises, the word plaintiff in Arts. 142 and 144 must be, in my opinion, so construed as to cover a plaintiff who is in existence, although he may not be, on account of a disability mentioned in S. 6 of the Limitation Act, capable of bringing an action at once. If a person who has the right to bring a suit for the recovery of possession does not happen to be in existence, limitation under these Articles cannot be said to have started. It can only start when he comes into existence.

Cases of this nature are very different from those which are covered by S. 17 of the Limitation Act. The language of this section makes it clear that the "right to institute a suit or make an application" must be independent of the death of the person and must have been such as should have accrued during

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his lifetime if he had lived but did not do so on account of his death. This section does not seem to contemplate cases where the right of action is connected with or arises in consequence of, the death. But this is not the case here. The cause of action to set aside the alienation made by the previous manager, if it is not void *ab initio*, arises according to Art. 134-B on his death, resignation or removal and would not have accrued earlier as this was all that was "required to correct his failure to keep within acts of proper management."

But it is argued that the suit must be held to be barred as the math was in existence on the date of the previous manager's death, as it had the capacity to sue and is actually a plaintiff in the present suit. The criticism that the right of suit can only arise when a person capable of suing is in existence, it is contended, has no application to a case like the present where the plaintiff who is capable of suing existed on that date. The answer to this contention is to be found in the two passages quoted by my learned brother Venkataramana Rao, J., in his referring order from *Prosunno Kumari Debya* v. *Golabchand Baboo*[1], and from *Jagadindranath's case*[2]. If 'it is only in an ideal sense that property can be said to belong to an idol', if 'it still remains that the possession and management of the dedicated property belongs to the shebait' and if 'every such right of suit is vested in the shebait, not in the idol' or in the math, it would seem to follow that the temples or maths cannot be the plaintiffs by themselves without their shebaits or managers who must be in existence and capable of exercising their right to bring suits which vest in them—subject of course to the provisions contained in S. 6 of the Limitation Act. If such shebaits or managers happen to be in existence on the date on which the adverse possession is started, limitation will continue to run not only against them but as against the temple or mutt of which they are the sole accredited agents and after the expiry of the statutory period, subject to such other extensions that may be possible to add under the provisions of the Act, the suit for possession would have to be dismissed as barred by Art. 144. It is said that in construing the word 'plaintiff' in their Lordships' judgment in *Mahadeo Prasad Singh* v. *Karia Bharthi*[3].

1. (1875) L.R. 2 I.A. 145: 14 Beng.L.R. 450.
2. (1904) L.R. 31 I.A. 205: I.L.R. 32 Cal. 129.
3. (1934) 68 M.L.J. 499: L.R. 62 I.A. 47: I.L.R. 57 All. 159.

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Sir Shadi Lal took it as referring to the institution and not to the manager of the same. But no such question was before their Lordships for their consideration then and even taking the limitation as running from the date of Rajbans' death, which occurred in 1916, the action which was commenced in 1926, was held to be within time. There was no necessity in that case to consider whether the word 'plaintiff' was not used by the Legislature so as to cover the case of a matathipathi or a manager when suing on behalf of a math or other charitable or religious institution. The language in *Mahant Ram Charan Das* v. *Naurangi Lal*[1], is not, however, capable of that contention. The question that was formulated by their Lordships referred both to the math and the mahanth. That the math is a plaintiff (or perhaps a part of the plaintiff) cannot be doubted. Nor can it be, I venture to submit, denied that it was unable to protect itself or bring any action with that object. If the manager was the only human being who could bring a suit on behalf of the math and if it was not maintainable by any one else, the word 'plaintiff' cannot be used, in my humble opinion, for merely an inanimate juristic person which is unable to take any action itself. It is quite true that when a human being who is capable of maintaining an action is in existence, the period of limitation would not run against him alone but also against the institution as well. This is because in such cases the capacity to sue vests conjointly in two persons, one juristic and the other natural; the one being the complement of the other and thus filling the deficiency that either individually has in the other's absence. It would, therefore, follow that when the living person who could bring an action is not in existence, adverse possession cannot run against the institution, as one whole plaintiff, of which the inanimate and animate beings are two component parts, is not in existence but only, so to say, half the plaintiff and that an inanimate one.

The decision in *Mahant Ram Charan Das's case*[1], it might be added, has no bearing to a case like the present where there was no manager in existence to challenge the action taken by the previous manager. If the math is unable to sue without the intervention of the human agency of its own manager, the limitation cannot be, in my opinion, held to run against the math either.

1. (1933) 64 M.L.J. 505: L.R. 60 I.A. 124: I.L.R. 12 Pat. 251.

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Stating in the *Secretary of State for India in Council* v. *Debendralal Khan*[1], what constitutes adverse possession, their Lordships adopted the language of Lord Robertson in *Radhamoni Debi* v. *Collector of Khulna*[2], which was to the following effect:

> ". . . the possession required must be adequate in continuity, in publicity and in extent, to show that it is possession adverse to the competitor,"

and added:

> "The classical requirement is that the possession should be *nec vi nec clam nec precario*. Mr. Dunne for the Crown appeared to desiderate that the adverse possession should be shown to have been brought to the knowledge of the Crown, but in their Lordships' opinion, there is no authority for this requirement. It is sufficient that the possession be overt and without any attempt at concealment so that the person, against whom time is running, ought, if he exercises due vigilance, to be aware of what is happening."

The above quotation was cited by their Lordships in *Maharajah Srischandra Nandy* v. *Baijnath Jugal Kishore*[3], and would show that to be effective, to use their words:

> "The person against whom time is running, ought, if he exercises due vigilance, to be aware of what is happening."

It was not only impossible for the math to be aware of what was happening, however, greatly it may have exercised its vigilance, but what is worse, there was no living person, capable of bringing an action, in existence at the time when adverse possession is said to have started, who could have been aware of what was happening. Adverse possession need not necessarily be brought to the actual knowledge of the person against whom it is to operate, but the rule is subject to the qualification, as pointed out in the above case, that it is incumbent on those who plead and rely on adverse possession to show that the person against whom it was claimed ought to have been, by exercising due vigilance, aware that the property was being held adversely and if they failed to show this, their plea of adverse possession must fail apart from the question of whether their possession was adequate in continuity and extent. If the manager had not come into being till then, and it was the manager alone, being the only person entitled to sue on behalf of the math whose knowledge or rather whose capability of having knowledge was essential, it is fairly obvious that limitation or adverse possession could not start against the math either to his knowledge or

1. (1933) 66 M.L.J. 134: L.R. 61 I.A. 78: I.L.R. 61 Cal. 262 (P.C.).
2. (1900) L.R. 27 I.A. 136: I.L.R. 27 Cal. 943 at 950.
3. (1934) 68 M.L.J. 600: L.R. 62 I.A. 40: I.L.R. 14 Pat. 327 (P.C.).

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what was capable of being known by him, on the date of the previous manager's death and before he was appointed. Viewed thus, adverse possession must be held to have commenced from the date of the plaintiff's election or appointment and not earlier. I agree that the costs of the reference should be made costs in the appeal.

Krishnaswami Aiyangar, J.

Krishnaswami Aiyangar, J.—Of the three questions referred, it is the first alone which presents a difficult question of construction. Art, 134-B with which we are primarily concerned was enacted for the first time in 1929, and during the eleven years that since elapsed, no occasion appears to have arisen for an authoritative pronouncement regarding the precise scope of the Article, much less on its applicability to the peculiar facts which are here present. The argument at the bar proceeded therefore, mostly on general principles. It is to be observed at once, that general principles rarely, if ever, occasion anxiety to Courts, but it is their application to concrete facts which often presents problems of considerable difficulty. One can readily grant in the abstract the soundness of the elementary rule that when the words of a statute are clear and unambiguous, the Court must give effect to their plain meaning, uninfluenced by considerations of possible hardship, inconvenience or even injustice in individual cases. For where the language is explicit, its consequences are for the Legislature and not for the Courts to consider. It may also be conceded that what has been termed the rule of equitable construction, based on "the equity of the statute" is an antiquated doctrine not favoured in modern times, and appears to have fallen out of use even in England at the present day (Craies on Statute Law 97). There is, it is not to be forgotten:

> " Another elementary rule that a thing which is within the letter of a statute will, generally, be construed as not within the statute unless it be also within the real intention of the Legislature, and the words, if sufficiently flexible, must be construed in the sense, which if less correct grammatically is more in harmony with that intention." (Maxwell 17).

The rule on the subject has been long ago laid down by such eminent authorities as Lords Blackburn and Halsbury, than whom I can desire no better or safer guides. In *River Wear Commissioners* v. *Adamson*[1], Lord Blackburn said:

> " In all cases the object is to see what is the intention expressed by the words used. But from the imperfection of language it is impossible to know

1. (1876-7) 2 A.C. 743.

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what that intention is without inquiring further and seeing what the circumstances were with reference to which the words were used and what was the object appearing from those circumstances which the person using them had in view."

In *Eastman Photographic Materials Co. Ltd.* v. *Comptroller-General of Patents, Designs and Trade Marks*[1], Lord Halsbury said:

"... to construe the statute now in question it is not only legitimate but highly convenient to refer both to the former Act and to the ascertained evils to which the former Act had given rise, and to the later Act which provided the remedy."

The rules of construction set out above warrant a consideration of the state of the law as it was understood to be when the Amending Act of 1929 was passed. It is only by so doing that one can obtain a clue to the correct understanding of the scope and effect of Art. 134-B, by a knowledge of the causes which led to the enactment. If we can be certain of the particular defect in the law, which the Legislature set out to remedy, whether it consisted of an evil to be removed, or a doubt to be resolved, we shall be better equipped to approach the construction of the language, used, than otherwise.

Up till the decision of the Privy Council in *Vidya Varuthi* v. *Balusami Aiyar*[2], the true legal relation in which the head of a Math or the Dharmakartha of a temple stood towards the properties in his charge had not been correctly understood in this country—*Dattagiri* v. *Dattatraya*[3], *Behari Lal* v. *Muhammad*[4], *Nilmony Singh* v. *Jagabandhu Roy*[5], *Baluswami Aiyar* v. *Venkataswami Naicker*[6]. The dicta in some of the earlier decisions even of the Privy Council cannot be said to have been wholly free from ambiguity. The current of judicial opinion ran largely on the view that S. 10 and Art. 134 applied indifferently to all cases of endowed property improperly alienated, whether that property belonged to a math or to a temple. *Vidya Varuthi's case*[2], finally rejected this view and declared in a manner no more open to misapprehension, that neither of the two provisions was applicable to the holding of such a species of property. The head of a math and the shebait of a

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1. (1898) A.C. 571 at 576.
2. (1921) 41 M.L.J. 346: L.R. 48 I.A. 302: I.L.R. 44 Mad. 831 (P.C.).
3. (1902) I.L.R. 27 Bom. 363.
4. (1898) I.L.R. 20 All. 482 (F.B.).
5. (1896) I.L.R. 23 Cal. 536.
6. (1916) 32 M.L.J. 24: I.L.R. 40 Mad. 745.

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temple are not trustees in the legal acceptation of the word, and the property entrusted to their charge was not legally vested in or conveyed to them in trust. The result was the discovery of a *casus omissus* in the Limitation Act, regarding a well known and a rather frequent type of cases arising out of the malversation of temple or math properties by delinquent managers. The Legislature proceeded to supply the omission, instead of leaving such cases to be governed as theretofore by the residuary Art. 144. In framing the new Articles specifically providing periods of limitation for suits to set aside alienation of endowed property, and recovery of possession, the Legislature merely followed the elucidation of the principles contained in the judgment of the Privy Council in *Vidya Varuthi's case*[1]. That judgment laid it down in clear terms that a permanent lease granted by the manager of a mutt was good during his lifetime though on his death his successor could recover back the property free of the alienation. Adverse possession began to run from the death of the alienating manager, on the happening of which event the succeeding manager had a cause of action to sue to recover the property. These principles which are of course common to all similar institutions were explained in the following terms at page 855:

"According to the well settled law of India (apart from the question of necessity, which does not here arise) a Mahant is incompetent to create any interest in respect of the Mutt property to enure beyond his life. With regard to Mahant No. 2, he was vested with a power similarly limited. He permitted the plaintiff to continue in possession and received the rent during his life. Such receipt was with the knowledge which must be imputed to him that the tenancy created by his predecessor ended with his predecessor's life and can, therefore, only be properly referable to a new tenancy created by himself. It was within his power to continue such tenancy during his life, and in these circumstances the proper inference is that it was so continued, and consequently the possession never became adverse until his death".

It is plain that it was this passage which furnished the material for the drafting of Art. 134-B whose language closely follows the view expressed there. There was no occasion for introducing a change in the law so declared and no necessity existed for legislative intervention except to give effect to the principles laid down.

In a later part of my judgment, I have adduced arguments in support of the view that Art. 144 should not be understood as sanctioning the commencement of limitation at a time when there existed no manager. If that is a sound view, there is no

1. (1921) 41 M.L.J. 346: L.R. 48 I.A. 302: I.L.R. 44 Mad. 831 (P.C.).

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reason for thinking that the Legislature intended to enact a different principle when it framed Art. 134-B. Otherwise the Article will result in producing the startling consequences pointed out by my learned brother Abdur Rahman, J., that in a case where no successor happened to be appointed for a period of twelve years, the institution would stand to lose all its rights owing solely to the reason that no manager had been brought into existence to vindicate them on its behalf. It is, I consider with all respect, no answer to say that the blame rests with the electors who had neglected a duty incumbent on them to appoint a successor. The law enjoins this duty on the manager and not on the disciples of a math or the worshippers of a temple. The latter cannot sue for possession for themselves, though they *may* sue for the possession to be restored to a manager, if in existence or to one to be newly appointed: *Muhammad Sahib* v. *Karim Bibi Ammal*[1] and *Rangaswami Naidu* v. *Krishnaswami Aiyar*[2]. Their position in this respect is not higher than that of relators in regard to charitable property improperly alienated. *Chidambaranatha Thambiran* v. *Nallasiva Mudaliar*[3]. It is difficult to imagine that the Legislature contemplated the possibility of their taking action to protect the institution, and on this footing fixed the starting point for limitation, irrespective of whether there was or was not a manager who could sue. However that may be, the Article under consideration is designed to apply to suits for possession *by the manager* and considerations connected with the remoter rights of disciples and worshippers have no place in the construction of its language. Those rights are essentially different in character, and the remedies annexed to them are equally different.

These considerations incline my mind to the construction which has found favour with Abdur Rahman, J., which has the merit of avoiding what, I am satisfied, would be an unforeseen consequence of the wording found in Art. 134-B. To apply it to cases where there is an interregnum, would mean the abridgment of the period limited, and where it is long enough, the extinction of the right altogether. There may be no help for it, if the language is sufficiently explicit, but in my opinion it is not. *Prima facie* there is much to be said for the view that

1. (1914) 27 M.L.J. 270.
2. (1922) 44 M.L.J. 116: 17 L.W. 147.
3. (1917) 33 M.L.J. 357: I.L.R. 41 Mad. 124, 128.

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when the Legislature fixed a period of limitation it means that the litigant should have it in full and not merely in part, much less, none, of it. The reason is plain, and really underlies every rule of limitation, in the absence of express words to the contrary.

The Indian Limitation Act as is the case with all other statutes of limitation, fixes a period of limitation for causes of action in existence, not for those to arise in the future. The statute in fact assumes the existence of a cause of action, *Hurinath Chatterjee* v. *Mothurmohun Goswami*[1] and only aims at interposing a bar after a certain period, to a suit to enforce it. It has been repeatedly held that unless there is a completed cause of action, limitation cannot run; and there cannot be a completed cause of action, unless there is a person who can sue, and a person who can be sued, *Gelmini* v. *Moriggia*[2], *Dwijendra* v. *Joges*[3], *Palaniyandi Malavarayan* v. *Vadamalai Odayan*[4]. It is on this principle that S. 17 of the Act is based, though it is not exhaustive in this respect. It is again in this view only, that the decision of this Court in the cases of *Palaniyandi Malavarayan* v. *Vadamalai Odayan*,[4] *Manika Pillai* v. *Thanikachalam Pillai*[5], *Subbiah Thevar* v. *Samiappa Mudaliar*[6] could be supported. All these cases it is true were decided with reference to Art. 120, which fixes a period of six years from the date when the right to sue accrues. My Lord, the Chief Justice, delivering the judgment of the Full Bench in the last of these cases, observed:

"With regard to the second question it will be observed that Art. 120 declares that limitation shall start to run when the right to sue accrues. There can be no cause of action until there is a party capable of suing, and until there is a cause of action there can be no question of the law of limitation coming into operation: see *Murray* v. *East India Co.*,[7] *Meyappa Chetty* v. *Supramania Chetti*[8] *Charu Chandra Pramanik* v. *Nakus Chandra Kundu*[9] and *Mst. Bolo* v *Mst. Koklan*.[10] It follows that if a sole trustee of a public trust commits a breach of trust, the loss cannot be made good without voluntary action on the trustee's part, until there is a new trustee. The right to sue in such a case would have to lie in abeyance until a new trustee was

1. (1893) L.R. 20 I.A. 183: I.L.R. 21 Cal. 8, 18 (P.C.).
2. (1913) 2 K.B. 549, 552.
3. (1923) 39 C.L.J. 40.
4. (1912) 18 I.C. 373, 375.
5. (1916) 4 L.W. 369.
6. (1938) 1 M.L.J. 334: I.L.R. (1938) Mad. 586 (F.B.).
7. (1821) 5 Barn. and Ald. 204: 106 E.R. 1167.
8. (1916) L.R. 43 I.A. 113: 20 C.W.N. 833 (P.C.).
9. (1922) I.L.R. 50 Cal. 49.
10. (1930) 59 M.L.J. 621: L.R. 57 I.A. 325: I.L.R. 11 Lah. 657 (P.C.).

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appointed, in which case the period of six years' limitation would not commence until a new trustee had been appointed."

Here then is a qualification subject to which, Art. 120 has been construed, though there are no express words to that effect to be found in this Article. Venkataramana Rao, J., is of opinion that this is not to be regarded as a general principle applicable to all articles without exception, but must be limited to cases where, without specifying the starting point by reference to particular events or facts, the Legislature has contented itself with fixing it by reference generally to the accrual of the cause of action. It cannot of course be disputed that the Legislature can by the use of apt words make limitation run, by fixing an arbitrary point of time irrespective of whether there is a completed cause of action or not in the sense explained. But the Legislature should not be presumed to have acted in an arbitrary manner, and as I read Art. 134-B, it seems to me that in specifying the events mentioned in the third column, it was only attempting to give effect to the law as declared by the Privy Council. The choice of those events was made by way of describing the true cause of action as settled by the Privy Council, and there is not to my mind the slightest ground for importing the idea of arbitrariness in the fixation of the *terminus a quo* here. One has only to run one's eyes through the several articles to realise what an amount of care the Legislature has taken to fix the starting point with reference to the accrual of the cause of action.

If the charge of arbitrariness so far as this Article is concerned is unsustainable as I think it is, is there any reason why this Article should be regarded as not subject to the qualification, to which I have already referred? I have examined the English and the Indian cases on the point, and I can find no authority which limits the operation of the qualification to those cases only where, the statute has adopted the date of the accrual of the cause of action stated in general terms, as the date from which limitation would commence to run. I regret that I am unable with great respect to share the view that such a salutary principle is necessarily to be excluded, for no other reason than that the Legislature has proceeded a step further and described the cause of action with some definiteness and particularity. Where an omnibus article intended to apply to a variety of suits, too

numerous to specify, is to be framed, the Legislature cannot and nobody can, but be content to insert a general statement of the cause of action and leave it at that. That is precisely what has happened in the case of Art. 120. I consider that the proposition stated in the following words at page 205 in Lightwood's Time Limit of Action is of general application, applicable as much to Art. 134-B as to Art. 120, and read in the light afforded by it, time cannot be held to run until the succeeding manager is appointed. The passage is this:

"If at the time when a cause of action would arise there is no person capable of suing upon it, the statute does not commence to run. Until there is a person to sue, the cause of action does not fully accrue, and the operation of the statute is postponed accordingly."

The authorities cited by the learned author appear fully to support the statement of the law made by him. The only question is whether the language of Art. 134-B is sufficiently clear to exclude its application. In my view it is not. There is also much force in the argument that the Article worded as it is could not in any event be applied to a case where the manager contemplated in the first column of the Article had not come into existence at the point of time fixed in the third. This aspect of the question has been so fully examined by Abdur Rahman, J., that it is unnecessary for me to say anything more than that I generally agree in his reasoning. If this Article is to be put aside as not applicable, we are necessarily thrown back on Art. 144 to which resort must be had in all cases left unprovided for, by the more specific provisions of the Act.

The consideration of the true effect of Art. 144 is comparatively a simpler question, and is capable of an easy answer, if it is remembered that the question is not when the possession of the defendant became adverse in a general sense, but when it became *adverse to the plaintiff*. Inasmuch as the possession of the defendant has not only to be adverse, but adverse as against the plaintiff, it is self-evident that until there is a plaintiff in existence the statute cannot run. We have not therefore to consider in connection with this Article, the applicability of the rule in Murray's case, *Ramabrahma* v. *Kedar*[1], approved by the Privy Council in *Pramatha Nath Mullick* v. *Pradyumna Kumar Mullick*[2], for the qualification laid down in that case is implicit

1. (1922) 36 Cal.L.J. 478 at 483.
2. (1925) 49 M.L.J 30: I.L.R. 52 Cal. 809 (P.C.).

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in the words of the Article italicized above. There is still the controversy as to who in the case of maths and temples is to be regarded as the factual and not the nominal plaintiff in suits falling under the Article. Venkataramana Rao, J., is of opinion that it is the math or temple conceived as an artificial legal entity which is and must be regarded as the real plaintiff, so that in applying Art. 144, the question that falls to be considered is not whether the possession of the defendant becomes *adverse to the manager*, but whether and when it becomes *adverse to the math*, that is, to the artificial legal person supposed to represent the math and own its properties. With the utmost respect, I must say there is no warrant for this view either on principle or on the authority of the decided cases.

The peculiar character and incidents which attach to Hindu religious institutions in this country have no parallel in any other system of jurisprudence. The doctrine that an idol is not merely symbolic of a trust, but is a living sentient being *Rambrahma* v. *Kedar*[1], *Pramatha Nath Mullick* v. *Pradyumna Kumar Mullick*[2], capable of holding and owning property, is based on an article of faith sanctioned by Hindu religion, and recognised by the British Courts from very early times. The idol, to use the language of the law, is an artificial legal concept, a juridical entity in itself. In *Maharanee Shibessouree Debia* v. *Mothornath Acharjo*[3], it was laid down by the Privy Council, that:

"The rents constituted . . . in legal contemplation its (idol's) property. The shebait had not the legal property but only the title of a manager of a religious endowment."

In *Prosonno Kumari Debya* v. *Gulab Chand Baboo*[4], their Lordships explained the position by observing:

"It is only in an ideal sense, that property can be said to belong to an idol; and the possession and management of it must in the nature of things be entrusted to some person as shebait or manager. It would seem to follow that the person so entrusted must of necessity be empowered to do whatever may be required for the service of the idol, and for the benefit and preservation of its property, at least to as great a degree as the manager of an infant heir. If this were not so, the estate of the idol might be destroyed or wasted, and its worship discontinued, for want of the necessary funds to preserve and maintain them".

1. (1922) 36 C.L.J. 478 at 483.
2. (1925) 49 M.L.J. 30: I.L.R. 52 Cal. 809 (P.C.).
3. (1869) 13 M.I.A. 270 (P.C.).
4. (1875) 14 Beng.L.R. 450 at 459 (P.C.).

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In *Jagadindranath Ray* v. *Hemanta Kumari Debi*[1], the question again fell to be considered, and the legal position was more fully analysed. Their Lordships said:

"There is no doubt that an idol may be regarded as a juridical person capable as such of holding property, though it is only in an ideal sense that property is so held. And probably this is the true legal view when the dedication is of the completest kind known to the law. But there may be religious dedications of a less complete character. . . . . But assuming the religious dedication to have been of the strictest character, it still remains that the possession and management of the dedicated property belongs to the shebait. And this carries with it the right to bring whatever suits are necessary for the protection of the property. ***Every such right of suit is vested in the shebait, not in the idol.***"

The italics are mine. In *Vidya Varuthi* v. *Balusami Aiyar*[2], the Judicial Committee reiterated the same proposition in the following words:

"Under the Hindu Law, the image of a deity of the Hindu pantheon is, as has been aptly called a 'juristic entity', vested with the capacity of receiving gifts and holding property. Religious institutions, known under different names, are regarded as possessing the same juristic capacity, and gifts are made to them ***eo nomine***. . . . . When the gift is directly to an idol or a temple, the seisin to complete the gift is necessarily effected by human agency; called by whatever name, he is only the manager and custodian of the idol or the institution. . . . . In no case was the property conveyed to or vested in him, nor is he a "trustee" in the English sense of the term, although in view of the obligations and duties resting on him, he is answerable as a trustee in the general sense for maladministration."

Lastly in *Pramathanath Mullick* v. *Pradhyumna Kumar Mullick*[3], Lord Shaw observed as follows:

"A Hindu idol, is according to long established authority founded upon the religious system of the Hindus and the recognition thereof by Courts of law, a juristic entity. It has a juridical status with the power of suing and being sued. Its interests are attended to by the person who has the deity in his charge and who is in law its manager with all the powers which would, in such circumstances, on analogy, be given to the manager of the estate of an infant heir. It is unnecessary to quote authorities; for this doctrine, thus simply stated, is firmly established."

After these pronouncements it is purposeless to multiply authorities. The result is that an idol—the same is equally true of a math—is a legal abstraction, a juristic entity having only a notional existence but capable in theory of owning and holding property. This is but a fiction but its consequence in practice is to deprive the manager of legal title in the property, which he may only hold and possess on behalf of the institution not on his own. When he sues or is sued in a Court of law, the

1. (1904) L.R. 31 I.A. 203: I.L.R. 32 Cal. 129 (P.C.).
2. (1921) 41 M.L.J. 346: L.R. 48 I.A. 302: I.L.R. 44 Mad. 831 (P.C.).
3. (1925) 49 M.L.J. 30: L.R. 52 I.A. 245: I.L.R. 52 Cal. 809 (P.C.).

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form to be adopted is that appropriate to the fiction that it is the idol or the math, and not the manager that is the owner. Hence the necessity for using the name of the deity or the institution as the formal party on the record: *Jodhi Rai* v. *Basdeo Prasad*[1], *Nagappa* v. *Zamindar of Sivaganga*[2], in proceedings in Court. But the form is not to be mistaken for or confused with the substance. The substance of it is that the juridical possession is in the manager, and he alone can vindicate the rights appertaining to it. When a stranger usurps possession, it is he that is dispossessed not the institution and the right of action is his and not the idol's. Otherwise it will be impossible to understand the decision in *Jagadindranath Ray* v. *Hemanta Kumari Debi*[3] where the Judicial Committee gave to a minor manager the benefit of S. 6 of the Limitation Act in a suit by him as the shebait of an idol to recover possession of land belonging to it. The ground of the decision is contained in the following sentence at page 140:

> "The dispossession complained of has been found to have taken place after the date of the plaintiff's adoption, and therefore the cause of action in respect of it accrued to him, and to no one else, and it accrued according to the findings during his minority."

Language can scarcely be plainer. The party held to have been dispossessed was not the idol but its manager according to the decision, and hence it was that the cause of action was found to belong to him and to none other. It is impossible therefore in this type of cases, to hold that the idol can never be dispossessed; the only person who can be dispossessed is the person who has the possession in law, and that person is the manager. The subsequent decisions of the Board have no wise altered the view of law as conceived in this decision.

In *Damodar Das* v. *Lakhan Das*[4] the senior *chela* had during his lifetime by an *ekrarnama* executed in favour of the junior more than twelve years prior to suit, parted with the possession of a part of the math itself, in fact of the whole of a subordinate math, together with the properties annexed to it, and his successor's suit to recover it was held barred. It is to be observed that the Privy Council did not go back on its earlier decision in *Jagadindranath Ray* v. *Hemanta Kumari Debi*[3] in any respect. It did not make, and was not called upon to

1. (1911) I.L.R. 33 All. 735 (F.B.).
2. (1940) 1 M.L.J. 442: I.L.R. 1940 Mad. 858.
3. (1904) I.L.R. 32 Cal. 129: L.R. 31 I.A. 203 (P.C.).
4. (1910) 20 M.L.J. 624: L.R. 37 I.A. 147: I.L.R. 37 Cal. 885 (P.C.).

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make any pronouncement on the question whether the cause of action which was held barred was one which was vested in the idol as distinct from the manager. The case only decided that the suit was barred, as from the date of the *ekrarnama*; the possession of the junior chela "was adverse to the right of the idol and of the senior chela as representing that idol". This decision and an earlier one in *Gnanasambanda Pandarasannadhi* v. *Velu Pandaram*[1] have since been authoritatively explained by their Lordships in *Mahanth Ram Charan Das* v. *Naurangi Lal*[2] as having proceeded on the footing that in them unlike in the case before their Lordships, as in the case before us—the impugned alienation was void *ab initio* as it consisted of an assignment or disposition of the math and its properties, which "was void and would in law pass no title with the result that the possession of the assignee was perforce adverse from the moment of the attempted assignment." Where the alienation is not wholly void, but would stand good during the tenure of office of the alienating manager, adverse possession does not commence till that tenure comes to an end, by death, removal or resignation. In laying down the law in this manner, the Privy Council was only repeating what had already been ruled on in *Vidya Varuthi's case*[3]. The same principle has also been applied since in *Subbiah Pandaram* v. *Mahomed Mustapha Maracayar*[4], *Mahadeo Prasad Singh* v. *Karia Bharti*[5] and *Ponnambala Desikar* v. *Periyanan Chetti*[6] in which their Lordships further made it clear that all classes of endowments and all manner of alienations fall under it.

Can it be said that as the result of the Privy Council decisions in *Vidya Varuthi's case*[3] which is a land-mark as it were, on the topic under review, any doubt has been cast on the integrity of the law as enunciated in *Jagadindranath Ray's case*[7]? I think not. When the manager is ultimately barred, the institution is also barred, and there can be no doubt of this being the correct principle.

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1. (1899) 10 M.L.J. 29: L.R. 27 I.A. 69: I.L.R. 23 Mad. 271 (P.C.).
2. (1933) 64 M.L.J. 505: L.R. 60 I.A. 124: I.L.R. 12 Pat. 251 (P.C.).
3. (1921) 41 M.L.J. 346: L.R. 48 I.A. 302: I.L.R. 44 Mad. 831.
4. (1923) 45 M.L.J. 588: L.R. 50 I.A. 295: I.L.R. 46 Mad. 751.
5. (1934) 68 M.L.J. 499: I.L.R. 57 All. 159: L.R. 62 I.A. 47 (P.C.).
6. (1936) 71 M.L.J. 105: L.R. 63 I.A. 261: I.L.R. 59 Mad. 809.
7. (1904) I.L.R. 32 Cal. 129: L.R. 31 I.A. 203 (P.C.).

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For instance if a stranger manages by trespass, to dispossess the manager and continue in possession, for the statutory period, the rights of the manager as well as those of the institution will be barred. The same result will follow where a title by adverse possession is perfected by possession commenced under an alienation void from the beginning, or where the succeeding manager has allowed the possession of an alienee under an alienation valid during the tenure of office of his predecessor but not beyond, to continue for the full period of twelve years. The difference between void and voidable alienations in the sense explained in *Mahant Ram Charan Das's case*[1] may no longer be of any importance in cases falling under Art. 134-B. But in cases outside the Article it still holds good. The difference may perhaps be justified on the theory that in the former the alienating manager is under no personal bar, and that he is at liberty to take steps to get back the property ignoring the alienation: *Maulavi Muhammad Fahimul Huq* v. *Jagat Ballav Gosh*[2], *Ponnambala Desikar* v. *Periyanan Chetti*[3] while in the latter he cannot do so. This difference has to be recognised, having been imported into the law by the decision of the highest tribunal binding on all the Courts in India, in *Gnanasambanda Pandarasannadhi* v. *Velu Pandaram*[4] and *Damodar Das* v. *Lakhan Das*[5] and has come to stay as laid down in *Mahant Ram Charan Das's case*[1].

The general position resulting from the decisions noticed above may be formulated by saying that ordinarily a math or an idol is represented by its manager in whom alone all rights of action are vested, and who alone can enforce them. Rules of limitation which operate in bar of suits are to be understood as having reference to his action or inaction, the institution dropping out of account for this purpose altogether. Just in the same way as his possession is the possession of the institution, so also when he is dispossessed, the institution will be deemed to be dispossessed and not otherwise. It follows that when there is no manager, the institution cannot be held to be in possession as the right to possession inheres only in him and he alone can exercise it. In order that possession may be held to be adverse against the institution, it must be shown that it is

1. (1933) 64 M.L.J. 505 : L.R. 60 I.A. 124 : I.L.R. 12 Pat. 251 (P.C.).
2. (1922) I.L.R 2 Pat. 391 at p. 400.
3. (1936) 71 M.L.J. 105 : L.R. 63 I.A. 261 : I.L.R. 59 Mad. 809.
4. (1899) 10 M.L.J. 29 : L.R. 27 I.A. 69 : I.L.R. 23 Mad. 271 (P.C.).
5. (1910) 20 M.L.J. 264 : L.R. 37 I.A. 147 : I.L.R. 37 Cal. 885 (P.C.).

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adverse to the manager. In other words when there is no adverse possession against the manager, there can be none against the institution either. By its very name, adverse possession connotes the idea of a hostile competitive holding of property in such an overt manner "that the person against whom time is running ought if he exercises due vigilance, to be aware of what is happening": *Secretary of State for India in Council* v. *Debendralal Khan*[1]. The vigilance in the case of endowed property, is the vigilance expected of the manager on whom the duty to protect it is placed by law. The expression "adverse to the plaintiff" in column 2 of Art. 144 of the Act, must therefore be understood as meaning that the possession should be adverse to the real plaintiff in whom the right of action is vested disregarding the nominal plaintiff which is the idol or the math concerned.

If this is the correct view of the Article, then the further question when the possession of the defendant becomes adverse in regard to endowed property is not difficult to answer. The controversy which once existed on this subject as to whether adverse possession commenced from the date of the alienation or from the date when the tenure of office of the manager who made the alienation terminated, has been definitely and finally set at rest by the several Privy Council decisions to which reference has already been made. It has been finally declared that the former furnishes the correct starting point in cases where the alienation is void *ab initio* as where it comprises in whole or in part the math and its properties. In the ordinary type of cases, where the manager acts in excess of his powers, by creating an interest to enure beyond his tenure of office, the alienation is good till its termination, but from that time the possession of the alienee will become adverse to the succeeding manager and the institution, of course in the absence of any fresh arrangement between the parties.

But never till now has it fallen to the Court to apply the Article to a case where there was an interval of time between the termination of one manager's tenure, and the commencement of his successor's. The Privy Council did not contemplate such a situation in any of the cases so far decided by it. There is on the contrary good reason for thinking that Mr. Amir Ali who delivered the judgment of their Lordships in *Vidya*

1. (1933) 66 M.L.J. 134: L.R. 61 I.A. 78: I.L.R. 61 Cal. 262 (P.C.).

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Varuthi's case[1], did not envisage the possibility of hiatus, when he extracted the following passage from a judgment of his own while he was on the Bench of the Calcutta High Court in *Piran* v. *Abdul Karim*[2]:

" . . . . upon the death of the last incumbent, generally on the day of what is called the *sium* or *teja* ceremony (performed on the third day after his decease), the *fakirs* and *murids* of the *durgah*, assisted by the heads of neighbouring *durgahs*, instal a competent person on the *guddi*; generally the person chosen is the son of the deceased or somebody nominated by him, for his nomination is supposed to carry the guarantee that the nominee knows the precepts which he is to communicate to the disciples. In some instances the nomination takes the shape of a formal installation by the electoral body so to speak, during the lifetime of the incumbent."

What is stated in the above passage is equally true of Hindu institutions. There is little if any, scope for an interregnum in the case of Hindu temples, mostly under the management of a plurality of managers, or vested in hereditary Dharmakarthas. In the case of maths, the usual and recognised method of appointment is by nomination during the lifetime of the ruling Matathipathi by installing a junior who will in due course suceeed to the headship promptly on his death. Occasionally an appointment might be made by will where again there is no possibility of an interregnum. It is only when the choice has to be made by the disciples, which is a very rare event, that there is scope for an interregnum occurring. From the passage quoted, it would seem that even the last mentioned mode of succession was not regarded as likely to give rise to the problem.

Be that as it may, the language of the Article understood in the light of the peculiar principles applicable to endowed property, creates no difficulty whatever. There can therefore be no doubt that adverse possession cannot commence against the math when there is no manager, though when it once commences to run, it would run on in spite of the subsequent occurrence of a hiatus, which does not by force of S. 9 operate to stop it. The general rule of law is to bar a person who has a right to enter if he does not exercise his right in a certain time, not to bar those who cannot exercise those rights, *Katyayani Debi* v. *Udoi Kumar Das*[3]. I therefore concur in the answer given by Abdur Rahman, J., to the third question.

1. (1921) 41 M.L.J. 346: L.R. 48 I.A. 302: I.L.R. 44 Mad. 831 (P.C.)
2. (1891) I.L.R. 19 Cal. 203.
3. (1924) L.R. 52 I.A. 160: I.L.R. 52 Cal. 417 at 422 (P.C.).

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The second question raises the point whether a succeeding manager if a minor on the date of his election or management, can take advantage of S. 6 when he brings the suit. If Art. 144 is the proper article which governs the case, then the time from which the period of limitation is to be reckoned, is the date of the appointment which brought the manager into existence which is the date of the commencement of adverse possession. The benefit of the section will be attracted to the case. But if the true article applicable to the case is Art. 134-B, the minor manager cannot invoke the section to his aid, for on this hypothesis, time had already begun to run with the death, resignation or removal of the preceding manager, and the section excludes him from its benefit. There is no warrant for raising a fiction to date back his appointment to the date of the termination of the previous manager's tenure merely on the strength of the dictum of the Privy Council in *Prosunno Kumari* v. *Golab Chand Baboo*[1], that successive shebaits form a chain of continuing representation of the idol's property. I agree with the order made by my Lord as regards the costs of the reference.

B.V.V. —— *Reference answered.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE LAKSHMANA RAO.

The Public Prosecutor .. *Appellant**

v.

Nagappan Servai .. *Respondent (1st accused).*

Public Prosecutor v. Nagappan Servai.

Indian Penal Code (XLV of 1860), S. 397—Deadly weapon—If proof of user of weapon against the person robbed necessary—Enough if weapon used at the time of committing robbery.

S. 397 Indian Penal Code does not require the user of the deadly weapon to be against the person robbed. It is enough if it was used at the time of committing robbery.

Appeal under S. 417 of the Code of Criminal Procedure, 1898, against the order of acquittal of the aforesaid respondent (first accused) of an offence under S. 397 of the Indian Penal Code by the Assistant Sessions Judge of the Court of Session (Assistant) of the Ramnad Division at Devakottai dated 15th October, 1940, and made in Sessions Case No. 103 of 1940 etc.

1. (1875) 14 Beng.L.R. 450 (P.C.).

* Criminal Appeal No. 55 of 1941 and C. R. Case No. 52 of 1941. C. R. P. No. 51 of 1941. — 12th March, 1941.

Public Prosecutor v. Nagappan Servai.

A. S. Sivakaminathan for Appellant.

N. T. Raghunathan for Respondent.

The Court delivered the following

JUDGMENT.—The appeal and revision case arise out of Sessions Case No. 103 of 1940 in which two persons were tried by the Assistant Sessions Judge of Ramnad with a jury, the first accused for an offence under S. 392 read with S. 397, Indian Penal Code and the second accused, under S. 394 of the Indian Penal Code. The jury unanimously found the 1st accused guilty under S. 392 Indian Penal Code and the second accused under S. 394 Indian Penal Code and accepting the verdict the Assistant Sessions Judge sentenced the first accused to rigorous imprisonment for two years and the second accused to rigorous imprisonment for 18 months. The Crown appeals against the acquittal of the first accused of the offence under S. 397 Indian Penal Code and the revision case has been preferred by the Public Prosecutor for enhancement of sentence.

The case is simple and as found by the jury P. W. 2 was robbed of her jewels on her way to Nattarsankottai along with her mother P.W. 3 and brother P.W. 4. M.O. No. 1, the knife was used by the 1st accused to frighten P.Ws. 3 and 4, and it struck and caused hurt to P.W. 2. The second accused then removed the jewels and both the accused were caught soon after, the first accused with M.O. No. 1, the knife with human blood on it and the second accused with M.O. Nos. 2 to 5 the stolen jewels. The knife M.O. 1 is a deadly weapon and it was used at the time of committing the robbery. S. 397 Indian Penal Code does not require the user to be against the person robbed and the guilt of the first accused under S. 392 Indian Penal Code read with S. 397 Indian Penal Code admits of no doubt. The appeal is therefore allowed and the first accused is convicted under S. 392 read with S. 397 Indian Penal Code and sentenced to the minimum punishment of rigorous imprisonment for seven years.

The revision case becomes unnecessary as regards the first accused and the sentence of the second accused who is a first offender cannot be said to be inadequate. The revision petition is therefore dismissed.

S.V.V. *Appeal allowed and revision dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATARAMANA RAO, AND MR. JUSTICE ABDUR RAHMAN.

Boganatham Arunachalam Chetty and another. *Appellants** (*Plaintiffs 2 and 3*)

v.

Boganatham Krishnaveni Ammal and another. *Respondents* (*Defendants 1 and 2*).

Arunachalam Chetty *v.* Krishnaveni Ammal.

Hindu Law—Mother succeeding to son—Nature of estate taken—Reversioner's suit to restrain waste—If proof of actual waste necessary—Reasonable apprehension of waste enough.

The estate taken by a mother inheriting the property of her son is the same as that taken by a widow inheriting the property of her husband. She is not a trustee for the reversioner and whether the property is moveable or immoveable, she is entitled to have possession thereof and enjoy the same in accordance with the powers which the Hindu law confers upon her. But her powers of disposal over the corpus of the estate are limited. She can only deal with and dispose of the corpus for purposes which are sanctioned by Hindu law; and where she acts in excess of her powers, the Court can always restrain her. The Court's power of interference is not limited to cases where a widow has been actually guilty of any specific act of waste or mismanagement. When her conduct is such as to raise a reasonable apprehension that if she is allowed to have uncontrolled possession of it, she would not administer it in accordance with the powers which the law confers upon her, it is open to the Court to give such appropriate relief to the reversioner as would secure the property from being spent away for purposes other than those sanctioned by Hindu Law.

Appeal against the decree of the District Court of North Arcot at Vellore in O. S. No. 12 of 1936 (O. S. No. 76 of 1935, Sub-Court, Vellore).

K. V. Ramachandra Aiyar and *S. Thyagaraja Aiyar* for Appellants.

The Advocate-General (*Sir A. Krishnaswami Aiyar*) and *B. C. Seshachala Aiyar* for Respondents.

The judgment of the Court was delivered by

Venkataramana Rao, J.

Venkataramana Rao, J.—This appeal and the memorandum of objections arise out of a suit filed by the plaintiffs as reversioners of the estate of one Kumaraswami Chetti for restraining the first defendant, the mother of the said Kumaraswami Chetti from committing waste of the property inherited by her from her son. The first plaintiff was related to the said Kumaraswami as his great grandfather's brother's son. Plaintiffs 2 and 3 are the sons of the deceased brothers of the first

* Appeal No. 279 of 1937. 5th April, 1940.

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plaintiff. The first plaintiff died during the pendency of the suit in the lower Court and plaintiffs 2 and 3 were declared as his legal representatives. The second defendant Subbammal is the grandmother of the deceased Kumaraswami Chetti being his father's father's wife. The third defendant is the wife of Kumaraswami's great grandfather. Defendants 2 and 3 are admittedly persons entitled to maintenance out of the estate of Kumaraswami. In the plaint the plaintiff alleged that the first defendant was entirely in the hands of her father, one Muthukrishna Chettiar, that the bulk of the property was moveable property, being fixed deposits in Banks and that the conduct of the widow was such as to raise a reasonable apprehension that the corpus of the estate would be endangered if the first defendant was allowed to have a free hand with the management of the property inherited by her. The first defendant denied that she was guilty of any act of waste and that no case was made out for restraining her right to the possession of the property inherited. The learned District Judge found that on the date of the death of Kumaraswami Chetti the estate consisted of two houses and a vacant site lying at Vellore and a sum of Rs. 18,500 in the shape of fixed deposits in the Co-operative Urban Bank, Vellore, in the Karur Vysia Bank, Karur, and in the Kannikaparameswari Bank at Dindigul, that of the two houses, the first defendant was living in one house and the other was required for the residential purpose of the second defendant, that no income was derived from the immoveable properties, that only a sum of Rs. 670 per year was the income from the cash deposits and the balance that remained after the payment of house tax was the net income of the widow, and that she was also bound to pay maintenance to defendants 2 and 3 at the rate of Rs. 7 and Rs. 10 per month respectively. But by the date of the decree in the lower Court the third defendant seems to have died. In regard to the allegation regarding waste the learned District Judge found that the plaintiffs were unable to adduce any specific acts of waste committed by the first defendant. He was however of the opinion that there were sufficient grounds for the plaintiffs to entertain a reasonable apprehension that the cash which forms the bulk of the estate would disappear unless some safeguard was provided. He therefore passed the following decree:

" In the result, there will be a decree in favour of the plaintiffs directing that the first defendant may be at liberty to renew the deposits now lying in

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the Vellore and Karur Banks and that if at any time she desired to withdraw the deposits or re-invest them in other securities, public or private, she shall be entitled to do so but only on her application to the Court and after notice to the plaintiff of her intention to do so. The object of this notice would be to enable the reversioners to take such steps as they may be advised to take, with a view to prevent the first defendant from dealing with the money in the manner proposed by her. In other words, such questions as may be raised in that behalf shall not be liable to be investigated or determined in the course of the execution of this decree but only in a separate suit. In view of the fact that the plaintiffs have made exaggerated allegations and their success is partial, I would direct that each party shall bear his or her own costs of the suit."

The plaintiffs have filed the appeal objecting to the decree on the ground that, on the findings arrived at, the lower Court should have granted an injunction in the terms of the plaint. The first defendant has filed a memorandum of cross-objections urging that on the findings arrived at by the lower Court no case was made out for restraining her from dealing with the property.

The learned Advocate-General on behalf of the first defendant contended that, in view of the finding of the learned District Judge that no specific acts of waste or mismanagement by the first defendant were proved by the plaintiffs, the learned Judge ought to have dismissed the suit. He relied on *Venkamma* v. *Narasimham*[1], and the decision in *Hurrydoss Dutt* v. *Sreemutty Uppoornah Dossee*[2], in support of his contention. It is no doubt true that the nature of the estate taken by a mother inheriting the property of her son is the same as that taken by a widow inheriting the property of her husband, that she is not a trustee for the reversioners and that whether the property is moveable or immoveable, she is entitled to have possession thereof and enjoy the same in accordance with the powers which the Hindu law confers on her. But her powers of disposal over the corpus of the estate are limited. She can only deal with and dispose of the property for purposes which are sanctioned by Hindu law; but where she acts in excess of her powers, there can be no doubt that she can always be restrained. Though no specific acts of waste or mismanagement are proved yet where the property is moveable or cash and her conduct is such as to raise a reasonable apprehension that if she is allowed to have uncontrolled possession of it she would not administer it in accordance with the powers which the law confers upon

1. (1921) 41 M.L.J. 279: I.L.R. 44 Mad. 984.
2. (1856) 6 M.I.A. 433.

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her it is open to the Court to give such appropriate relief to the reversioner as would secure the property from being spent away for purposes other than those sanctioned by Hindu law. Such reliefs have always been given by Courts: vide *Durganath Pramanik* v. *Chintamani Dassi*[1]. That the Court's power of interference is not limited to cases where a widow has been actually guilty of any specific act of waste or mismanagement but extends to cases where reasonable apprehension of waste is made out is clear from the decision in *Hurrydoss Dutt* v. *Sreemutti Uppoornah Dossee*[2]. The Right Honourable Pemberton Leigh after referring to the case of *Cassinath Bysack* v. *Hurrosoondary Dassee*[3], observed that the law was perfectly settled by that decision and it was followed by Sir Lawrence Peel, the learned Chief Justice of Bengal, whose judgment was under review in the said case. With reference to the facts of the particular case before him he applied the principle of that decision thus:

"Can it be said that the respondent, who, according to the ordinary Hindu custom, keeps in her house a certain portion of the money having in the course of three months, invested Rs. 39,000, three-fourths or at least two-thirds, of the money in other securities, was guilty of a *devastavit*, or showed the slightest intention of committing a *devastavit* in this respect? Their Lordships are of opinion that no such case is made out."

It is clear from this observation that it is not necessary that the widow should be guilty of an actual *devastavit* and it is enough if there was the intention of committing a *devastavit*. The reference to the judgment of Sir Lawrence Peel makes this matter clear. The learned Chief Justice in the course of his judgment observed thus at pages 438 and 439 in *Hurrydoss Dutt* v. *Sreemuttee Uppoornah Dossee*[2]:

"It is only where she is about to deal with the property in a mode contrary to the Hindu law in extension of her powers over it, and in derogation of the rights of those who may succeed to it, that the Court would be justified in restraining her in the use, custody and disposition of it. . . . . . . There is nothing whavever admitted to show that the money is in any danger. The mode of custody is not shown. It was stated in argument that she has it in her private dwelling, but that even is not admitted. Now this is nothing like waste or like that sort of dealing with the property which would justify a Court of equity in interfering.

. . . . Here she does not even change the security. It does not proceed from her act, but she is paid off. If she were about to invest in an unsafe security, that might justify the interference of the Court."

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1. (1903) I.L.R. 31 Cal. 214. 2. (1856) 6 M.I.A. 433.
3. (1826) Clarke's Rules and Orders (Appeal) 91.

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This judgment therefore seems to indicate that the relief which the reversioner can get is not limited only to cases of actual mismanagement but conduct justifying danger to the reversion would be enough such as the intended investment in an unsafe security. In this case the first defendant is only about 24 years of age and she is obviously under the influence of her father who is now living with her and has a large family of his own. It is not shown that he is possessed of any property. In the course of the suit the first defendant made an application for withdrawal of a sum of Rs. 1,900 on the ground that a part thereof, namely, Rs. 1,500 had to be paid to her father who was alleged to have lent that sum to her. The case of the plaintiff was that the loan by the father could not be true as he was not possessed of any means to lend that sum of money and that that sum also was not needed for any purpose which would justify her to borrow under the Hindu law. The first defendant made no attempt to substantiate that her father lent the money and that it was necessary to repay that loan. In fact, nothing has been shown that such a sum was spent for any purpose binding on the reversioners. The father has not gone into the witness box to prove the loan. She admitted in her deposition that her father and herself maintained accounts but those accounts were not produced. The inference therefore is that she wanted to draw this large sum of money and appropriate it for her own purposes. The Court was therefore warranted in inferring that she would deal with the property in a mode contrary to Hindu law in extension of her powers. An occasion has therefore arisen for the interference of the Court to give such equitable relief as would safeguard the interests of the reversioners. The relief will have to be moulded according to the circumstances of the case. As the learned Judge points out, no case for an injunction or for a receiver has been made out. Therefore in giving appropriate relief in this case the principle which has to be kept in view is that while the first defendant should not be allowed to deal with the property in excess of her powers under the Hindu law, she must at the same time be protected from unnecessary harassment at the hands of the reversioners. In this case the conduct of the reversioners was such that they would not hesitate to harass the widow even without any justifiable cause.

The question now is, was the decree given by the learned Judge such as would justify this principle? We are inclined to

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think that it does not and we therefore propose to modify the decree thus. The first defendant will be at liberty to renew the deposits now lying in Vellore, Karur and Dindigul Banks, and if at any time she desires to withdraw the deposits or re-invest them in other securities, she shall be entitled to do so but only with the sanction of the Court but no sanction is necessary for realising interest on the sums in deposit or invested in securities. If the application is for investment in securities other than those authorised by the Indian Trusts Act or if she desires to withdraw the moneys and the withdrawal in the opinion of the Court does not appear to be *prima facie* justifiable or if the purpose of withdrawal is justifiable but the amount proposed to be withdrawn appears to the Court to be *prima facie* more than necessary, the Court shall issue a notice to the plaintiffs. If the plaintiffs appear and object and the Court after considering their objections comes to the conclusion that the withdrawal is not for a justifiable purpose, it shall dismiss the application. But if the Court comes to the conclusion that the purpose is justifiable, it shall allow such amount as it considers reasonable. A copy of this order will be served on the several Banks where the money is now in deposit at the plaintiffs' expense. We dismiss this appeal. The first respondent will take her costs of the appeal from the estate. The memorandum of objections is dismissed but without costs.

S. V. V. *Appeal and memorandum of objections dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE LAKSHMANA RAO.

V. K. R. St. Kasi Viswanatha Chettiar .. *Petitioner* (2nd Accused).*

Kasi Viswanatha Chettiar, *In re.*

The Indian Companies Act (VII of 1913)—Managing Director eo nomine *—If guilty under S. 76 (1) in the absence of evidence of knowing and wilful default.*

The fact that the accused was one of the Managing Directors *eo nomine* of a company is not enough to sustain a conviction under S. 76 (1) of the Indian Companies Act unless the evidence warrants the conclusion that he was knowingly and wilfully a party to the default under the section.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying that the High Court will be pleased

* Cr. R. C. No. 1033 of 1939. (C. R. P. No, 970 of 1939). 4th April, 1940.

to revise the judgment of the Second Presidency Magistrate of the Court of the Presidency Magistrates, George Town, Madras in C. C. No. 1884 of 1939.

C. Narasimhachari for *A. M. Krishnaswami Aiyangar* for Petitioner.

C. D. Venkataraman for *Crown Prosecutor* for Crown.

The Court passed the following

ORDER.—The petitioner was one of the Managing Directors *eo nomine* and the evidence does not warrant the conclusion that he was knowingly and wilfully a party to the default under S. 76 (1) of the Indian Companies Act. The conviction of the petitioner is therefore set aside and the fine if levied will be refunded.

S. V. V. *Conviction set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Original Insolvency Jurisdiction.]

PRESENT:—MR. JUSTICE SOMAYYA.

The Official Assignee .. *Applicant**

v.

The Secretary, M. & S.M. Ry. Employees' Co-operative Urban Bank, Limited .. *Respondent.*

Presidency Towns Insolvency Act, (III of 1909), S. 60, (2)—Insolvent's allocation—Fixing of—Rules—Balance of salary after allocation—Absolute right of insolvent over—Authorising employer to pay a creditor out of future salary—Nature of right conferred—Effect of insolvency.

An employee in a Railway workshop was adjudicated an insolvent on 29th April, 1936. He was at that time drawing a salary of Rs. 202-8-0. On 19th October, 1935, he obtained a loan of Rs. 1,500 from the Railway Employees' Co-operative Bank during the pendency of prior insolvency proceedings against him. The loan was repayable in thirty-six monthly instalments of Rs. 41-10-0 each out of his salary. The Official Assignee by a letter of 8th October, 1935, permitted the raising of the loan and by another letter of 15th November, 1937, permitted the Bank to recover the amount of the loan from the salary of the insolvent. A material term of the loan was that the amount was recoverable from the borrower's salaries or any other money which might be due to him from his employers who were authorised and requested to deduct the amount out of the salary and pay it over to the Bank. Under the bye-laws of the Bank any money to the credit of a member was to be subject to a first charge in favour of the Bank in respect of monies due from the member. The Bank, acting *bona fide* and without notice of insolvency till after April, 1939, recovered the loan from the monthly salary of the insolvent and closed the account in April, 1939. The allocation was fixed under S. 60 (2) presumably after taking into considera-

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*Appln. No. 271 of 1939 in I.P. No. 230 of 1936. 16th January, 1940.

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tion the amount payable towards the loan from out of the salary. The Official Assignee then applied under S. 7 of the Presidency Towns Insolvency Act for an order directing the Bank to return all sums recovered from the salary of the insolvent towards refund of the loan. In the circumstances,

Held, that, (*i*) on the date of the insolvency there was only an authority or direction and request by the debtor to the employer to pay a portion of his salary to the Bank or at best a contract to assign the future salary as and when it was earned and there was no completed assignment of an equitable charge over the future earnings.

It was an authority revocable at any time and it was revoked by the insolvency.

Even treating it as a contract to assign, the liability in respect of the contract was one for damages for breach, provable in the insolvency.

(*ii*) Only so much of the insolvent's salary as was ordered by the Court under S. 60 (2) to be paid to the Official Assignee vested in him and the balance was at the absolute disposal of the insolvent and the Official Assignee cannot recover the amount from the creditor to whom it had been paid.

(*iii*) The Official Assignee's conduct in permitting the amount to be paid to the creditor amounted to a voluntary payment which cannot be recovered.

(*iv*) The ordinary rule in fixing the amount of allotment amount under S. 60 (2) is that the first Rs. 100 and a half of the excess over Rs. 100 of the salary are exempt from attachment and there is no reason why the balance should not be paid for the benefit of the general body of creditors.

Authorities discussed.

Application under S. 7 of the Presidency Towns Insolvency Act for directions in the Insolvency of A. V. Jones and Mrs. A. E. Jones.

T. R. Venkatarama Sastri and *V. Varadaraja Mudaliar* for Applicant.

C. Krishna Reddi for Respondent.

U. N. Rao for Insolvent.

The Court delivered the following

JUDGMENT.—This application has been taken out by the Official Assignee under S.7 of the Presidency Towns Insolvency Act for an order directing the Secretary, the Madras and Southern Mahratta Railway Employees' Co-operative Urban Bank, Ltd., to refund to him all sums recovered by the said Bank by way of deduction from the salary of the first insolvent towards refund of the loan taken by the said insolvent from the Bank.

The facts are briefly as follows: The first insolvent, who was employed as a charge-man in the Madras and Southern Mahratta Railway, Workshops, Perambur, was adjudicated on

29th April, 1936. He was at that time drawing a salary of Rs. 202-8-0. Sometime prior to his adjudication that is on 19th October, 1935, he obtained a loan of Rs. 1,500 from the bank during the pendency of a prior insolvency proceeding. The insolvent undertook to repay the loan in thirty-six monthly instalments of Rs. 41-10-0 each out of his salary and authorized and requested the Madras and Southern Mahratta Railway Company to pay the said instalments to the bank out of his salary and the bank was so recovering the loan from the monthly salary of the insolvent until April, 1939, when the loan account was closed and the sureties discharged.

The Official Assignee, by his letter dated 8th October, 1935, Exhibit D-2 in the case, permitted the raising of the loan and by his letter, dated 15th November, 1937, Exhibit D-1, addressed to the bank permitted it to recover the amount of the loan from the salary of the insolvent. The terms on which the loan was granted by the bank were, *inter alia*, that it should be guaranteed by two sureties and that the amount was recoverable from the borrower's salaries or any other money which might be due to him from the Madras and Southern Mahratta Railway Company, who were authorised and requested to deduct the amount from out of his salary and to pay it over to the bank. Exhibit D-3, which is a form of Loans Passed Register, provides:

"I . . . . . . the borrower hereby authorize and request the Madras and and Southern Mahratta Railway Company, Ltd., to deduct from my monthly salary or any other money that may be payable to me by the Madras and Southern Mahratta Railway Company, Ltd., such instalment or instalments of principal of the loan, or interest due on such loan, or, any other sum or sums which the Madras and Southern Mahratta Railway Employees' Co-operative Urban Bank, Ltd., Adam's Park, Madras, may claim as due from me to the said bank."

Exhibit D-5 which is the application for loan also contains a similar clause. The service agreement, Exhibit D-4, also contains a similar provision:

"I also agree to deductions from my salary or any other monies payable to me by the company being made on account of dues to the Madras and Southern Mahratta Railway Co-operative Society and the Madras and Southern Mahratta Railway Employees' Co-operative Urban Bank, Ltd., for the use of railway schools and railway institutes for services rendered by railway medical officers and for diets supplied in railway hospitals."

R. 44 of the bye-laws of the bank, Exhibit D-6, provides:

"It shall be competent for the Board of Directors to refuse to grant a loan unless the applicant shall agree in writing to permit the officer disburs-

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ing the pay to deduct instalments from his monthly pay to discharge the whole or part of the loan."

R. 48 provides:

"The amount of paid up share-capital, deposit and any other money to the credit of a member or a past member shall be subject to a first charge in favour of the bank in respect of any monies due to the bank from such member or past member."

The loan in question was not recovered as provided by this rule.

On the above facts the questions that arise for consideration are:

(i) What is the nature of the transaction between the insolvent and the Madras and Southern Mahratta Railway Employees' Co-operative Urban Bank, Ltd.? Whether the transaction amounts to an equitable charge or assignment in favour of the said bank, in respect of so much of the future salary of the insolvent as is necessary for the payment of the monthly instalments?

(ii) What, if any, is the effect of the insolvency of the debtor on the said transaction?

(iii) Whether, in any event, the bank having recovered the loan in pursuance of the agreement, such payments are protected and the bank cannot be ordered to refund the amount recovered?

The contention of the bank is that the transaction amounted to an equitable charge or assignment in favour of the bank in respect of so much of the salary as was necessary to pay up the monthly instalments and interest thereon, and that the transaction was not in any way affected by the subsequent insolvency of the debtor. It was also contended that the salary of the insolvent did not vest in the Official Assignee in the absence of an order of Court made under S. 60 of the Presidency Towns Insolvency Act, that the insolvent was at liberty to deal with it in any manner he pleased and that in any case the Official Assignee having permitted the raising of the loan and the recovery thereof from out of the insolvent's salary and the recovery having been made with the full consent of the insolvent and the Official Assignee and in pursuance of an agreement with the insolvent authorizing such recovery, it was no longer open to the Official Assignee to claim refund of the amount. It was stated that the bank had no notice of the insolvency till 12th September, 1939 and that it acted perfectly *bona fide*.

Before proceeding to deal with the various points it will be useful to notice the provisions of the Presidency Towns Insolvency Act which have a bearing on the said points and the general scheme of the Act. The policy of the insolvency law is

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equal distribution of the assets of the insolvent among the creditors who are entitled to prove their debts in insolvency, and it expressly provides against preference of one creditor to another. S. 17 of the Act lays down that the property of the insolvent shall vest in the Official Assignee and shall become divisible among his creditors and that thereafter no creditor to whom the insolvent is indebted in respect of any debt provable in insolvency shall during the pendency of the insolvency proceedings have any remedy against the property of the insolvent, in respect of the debt. It saves the right of the secured creditor to realize or otherwise deal with his security in any manner.

S. 49 provides for the distribution of the property of the insolvent and lays down that all debts shall rank equally between themselves and shall be paid rateably 'and without any preference'. S. 52 defines the property of the insolvent and it comprises all such property as may belong to or be vested in the insolvent at the commencement of the insolvency *or may be acquired* by or devolve on him before his discharge. S. 57 protects *bona fide* transactions and saves any payment by the insolvent to any of his creditors and any contract or dealing by or with the insolvent for valuable consideration, provided that any such transaction takes place before the date of the order of adjudication and the person with whom such transaction takes place has not at the time notice of the presentation of any insolvency petition by or against the debtor. S. 60 deals with the pay or salary or other income of the insolvent and cl. 2 provides:

"Where an insolvent is in the receipt of a salary or income other than as aforesaid, the Court may, at any time after adjudication and from time to time, make such order as it thinks just for the payment to the Official Assignee, for distribution among the creditors of so much of such salary or income as may be liable to attachment in execution of a decree, or of any portion thereof."

It will be apparent from the foregoing provisions that the insolvency law aims at equal and rateable distribution of the property of the insolvent among the creditors who are entitled to prove their debts in insolvency without any preference of one creditor over another, that the property of the insolvent comprises also what is known as the after-acquired property, and that payments made by the insolvent to any of his creditors will be protected provided they are made before his adjudication and the creditor has no notice of the insolvency.

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I shall now proceed to deal with the several questions that arise in the case in the order set out by me.

First, as regards the nature of the transaction between the insolvent, the bank and the Madras and Southern Mahratta Railway Company, the question is whether an equitable charge or assignment is created in respect of the insolvent's future salary. This depends upon the construction of Exhibits D-3, D-4, D-5 and D-6. Exhibits D-3 and D-5 employ practically the same language and they contain an authorization and request to the Madras and Southern Mahratta Railway Company to deduct the instalments from out of the insolvent's salary every month. By the service agreement, Exhibit D-6, the insolvent agrees generally to such deductions. The documents do not contain any promise to the bank to pay the loan . . . . . . *out of* the future salary. They merely authorize and request the Madras and Southern Mahratta Railway Company to withhold the amount of the monthly instalments and to pay it over to the bank. Reference may be made to r. 48 of the bye-laws of the bank, Exhibit D-5, which expressly provides for a charge on certain amounts standing to the credit of the insolvent, namely share capital, deposit, etc. The language of r. 44 is different and does not like r. 48 provide in express terms that a charge is created. But apart from the contrast with the language of r. 48, and taking r. 44 by itself, it does not appear that the documents disclose anything more than a 'pay order'. R. 44 speaks of an agreement in writing *to permit* the officer disbursing the pay to deduct the instalments from his monthly pay to discharge the whole or part of the loan. The expression "to permit" is significant and that, taken along with the expression 'authorize and request' in Exhibits D-3 and D-5, lends support to the view that the transaction amounts to nothing more than a mere authority or request by the debtor to his employees to pay the bank. The decision in *Ex parte Hall.*, In re *Whitting*[1] may be usefully referred to in this connexion. In that case a customer borrowed £200 from his bankers on an agreement that the loan should be paid out of the rent of a farm which would become due to him in Michaelmas and he gave a letter to the bank addressed to the tenant by which he authorized and requested the tenant to pay £200 to the bankers when the

1. (1879) 10 Ch. D. 615.

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Michaelmas rent became due. The bankers forwarded the letter to the tenant. Meanwhile the customer was adjudicated bankrupt. It was held in that case that the letter amounted only to a revocable authority to pay the rent to the bankers and that it was revoked by the bankruptcy. Jessel, M.R., says in that case:

"The only thing we can look at is the letter itself, which *authorises and requests* the tenants to pay £200 to the bankers. It amounts to nothing more than a request to pay the bankers. On the face of it, it is simply an authority revocable at any time, and of course it was revoked by the bankruptcy."

There is also another aspect of the matter which may be considered, namely that the agreement in the case does not relate to a fund in existence but to a future contingent fund which may or may not come into existence even at a future date. It has no doubt been held that a promise to pay a debt out of a specific fund in existence at the time, whether payable *in proesenti* or in future, amounts to an equitable assignment of the fund so as to entitle the assignee of the fund to claim payment out of that fund. But that principle applied only to cases where the fund was in existence on the date of the assignment though payable on a future date and will not apply to a future contingent fund. "A man cannot in equity, any more than at law, assign what has no existence". See *Collyer* v. *Isaacs*[1]. It has been held in *Field* v. *Megaw*[2] that a promise to pay out of monies when received, that is a promise to pay when the debtor receives a debt due to him from a third person does not constitute an equitable assignment so as to charge the debt in the hands of such third person. I therefore hold there was no charge or completed assignment in this case.

Though 'a man cannot in equity any more than at law, *assign* what has no existence' he 'can *contract* to assign property which is to come into existence in the future, and when it has come into existence *equity*, treating as done that which ought to be done, fastens upon that property, and the contract to assign thus becomes a complete assignment'. That is, in the case of future property, though the assignment may not operate *in proesenti*, it may operate as and when the property comes into existence. Until then the assignment constitutes only a contract in respect of the future property and equity attaches to it as

1. (1881) 19 Ch.D. 342.
2. (1869) L.R. 4 C.P. 660.

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soon as the property comes into existence, when, the contract to assign becomes a completed assignment. As was observed by Jessel, M.R., in *Collyer* v. *Isaacs*[1].

"The assignment, in fact, constituted only a contract to give him the after-acquired chattels . . . and until the property comes into existence the contract remains only a contract by which the party entering into it will be bound, and when the property comes into existence it is a contract for the breach of which he will incur liability".

In that case there was a bill of sale by the debtor transferring for value to a creditor all the chattels at his place of business and all other chattels which may at any time be brought thereon. The creditor did not prove in bankruptcy but claimed certain chattels which were brought into the premises after the insolvent's adjudication, To the same effect are the following observations of Lindley. L. J., in *Ex parte Nichols.*, In re *Jones*[2] which was a case of an assignment by a trader of the future receipts of his business.

"It is an agreement to assign to Younger & Co., not property of Jones and Barber, but money which would become due to them under the arrangement between them and the Railway Company. It is a mere agreement for the breach of which no doubt an action would lie . . . . "

If therefore a person agrees to pay his creditor out of his future salary or income which is contingent on his earning the same the transaction amounts to a mere contract to assign until the salary or income comes into existence and will become complete only after the salary becomes due or after the income accrues and not before. Applying that principle to the present case, it will be seen that in respect of salary accruing subsequent to insolvency there was only a contract to assign as and when it was earned and that there was no completed assignment on the date of the adjudication. If that is so, the liability of the insolvent or his estate for breach of such contract will be only in damages and the creditor will not be entitled to enforce the transaction as against his subsequent salary, at any rate, not against the assignee in bankruptcy.

The result of the foregoing discussion is that on the date of the insolvency there was only an authority or direction and request by the debtor to the Madras and Southern Mahratta Railway Company, to pay a portion of his salary to the bank or at best a contract to assign the future salary as and when it was earned. There was no completed assignment or charge.

1. (1881) 19 Ch. D. 342.
2. (1883) 22 Ch. D. 782.

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What then is the effect of the insolvency on such direction to pay or contract to assign? Is it sufficient to give the creditor a right to the fund which will prevail over the rights of the Official Assignee? As was pointed out in the case of *Ex parte Hall.*, In re *Whitting*[1] already referred to:

"It is simply an authority revocable at any time and of course it was revoked by the bankruptcy".

Treating it as a contract to assign, even then, as pointed out in *Collyer* v. *Isaacs*[2]:

"When the party who contracts becomes bankrupt the liability in respect of the contract is a liability provable in bankruptcy".

The observations of Lindley, L.J., in *Ex parte Nichols.*, In re *Jones*[3] may also be usefully referred to:

"It is a mere agreement for the breach of which no doubt an action would lie but which cannot prevail against the title of the trustee so far as regards payments received by the Railway Company under it after his title accrued."

To the same effect are the observations of Lopes, L. J., in *Wilmot* v. *Alton*[4]:

"If the amount in question had been a debt which had accrued due at the date of the bankruptcy the case would have been different. But that was not so. In order to determine the nature of the right which was assigned to the plaintiff it is necessary to consider the terms of the contract. Having regard to those terms, it appears to me clear that there was only a debt which might or might not become due to the assignor in future according as the conditions of the contract were or were not fulfilled. That being so, the case appears to me to come directly within the decision in *Ex parte Nichols.*, In re *Jones*[3]."

The position is well summed up by Mulla in his book on the Law of Insolvency at page 348, S. 520:

"The effect of the subsequent insolvency of an assignor of future or after-acquired property may now be considered. If after acquired property comes into existence prior to the insolvency of the assignor, the equitable assignment is complete and the Official Assignee will take the property subject to the assignment. If the property comes into existence subsequently to the insolvency and before the discharge of the insolvent, the Official Assignee will take the property subject to the assignment if the right of the assignor to recover that which is claimed by the assignee had become complete prior to the insolvency but not if the right had not become complete before then. In the latter case the assignee has no right to the property . . . Thus if a debt which is to fall due at a future time is assigned and the debt only falls due after insolvency the assignee has no right to it".

This takes me to the next point, namely, how far the insolvent was competent to deal with his subsequent salary in the

1. (1879) 10 Ch. D. 615.
2. (1881) 19 Ch. D. 342.
3. (1883) 22 Ch. D. 782.
4. (1897) 1 Q B. 17.

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absence of an assignment or charge in favour of the bank and how far can the bank claim protection in respect of the payments made to it from out of the subsequent salary. It was argued that the insolvent was absolutely entitled to his after-acquired properties and can deal with and dispose of them as he pleased unless and until the Official Assignee intervened and that all dealings and transactions had or entered into by the insolvent before such intervention were valid and cannot be questioned by the Official Assignee or by the creditors. It was further argued that so far as the salary was concerned, under the special provisions of S. 60 of the Presidency Towns Insolvency Act it did not vest at all in the Official Assignee in the absence of an order of Court fixing such portion of the salary as it thinks fit for payment to the Official Assignee for distribution among his creditors, and that at any rate when an order had been made by the Court fixing what proportion of the salary should be paid to the Official Assignee month after month the balance of the salary was at the absolute disposal of the insolvent and that the Official Assignee cannot claim anything more.

The law in regard to after-acquired properties is that any dealing by the insolvent with reference to such property will be protected if the assignee acts *bona fide* and pays value, no matter that he has knowledge of the insolvency. In the present case it cannot be denied that the bank has paid value. It is also claimed by the bank that it had no notice of the insolvency until April 1939 and that it advanced the loan in the ordinary course of business prior to the insolvency. The averments are not controverted on behalf of the Official Assignee.

We have next to consider whether the payments made to the bank are protected. No doubt a distinction has been made between the insolvent's after-acquired property in general and his pay, salary or other income, by reason of the provisions contained in S. 60 which corresponds to S. 51 of the English Bankruptcy Act of 1914 and S. 53 of the Bankruptcy Act of 1883. What then is the position of the Official Assignee and the creditors with reference to his subsequent salary? Does the whole of it vest in the Official Assignee subject to the insolvent's retaining a sufficient portion necessary for the maintenance of himself and his family or is it only so much of it as is liable to attachment in execution of a decree which vests in him or is it that no part of it vests in the Official Assignee until

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an order is made by the Court fixing so much of it as it considers proper? Judicial opinion on the subject is not uniform. It was held in *Ex parte Huggins., In re Huggins*[1], by the Court of Appeal on a construction of the Bankruptcy Act of 1869 that the effect of Ss. 15 and 17 was to vest in the Trustee all property including those dealt with by Ss. 87 to 95 which relate to salaries, income, etc., (corresponding to S. 60 of the Presidency Towns Insolvency Act) but subject to the qualifications and exceptions introduced by those sections. But the decision in *In re Shine, Ex parte Shine*[2], seems to point in the other direction. That was a case in which an actor agreed to act in a theatre on a salary of £30 a week payable weekly and became bankrupt. He entered into an agreement with the theatre manager that he should retain £20 of his salary and discharge all his debts. The question was raised as to how far the arrangement was operative as against the trustee in bankruptcy. In upholding the arrangement Lord Esher, M.R., says:

"With regard to the particular salary or income which does not pass to the Trustee, the bankrupt had a right, notwithstanding the receiving order to make any bargain he chose."

Bowen, L.J., remarks dealing with S. 53 (2):

"Until the sub-section was put in force against him, by diverting to the use and advantage of the creditors that which was *prima facie* up to that moment *his own*, he had a perfect right, although he was a bankrupt, to make any bargain he pleased with any person as to the remuneration which he was to receive for his personal services."

The only Indian decision directly bearing on the point is the decision of a single Judge in *In the matter of C.M.J. Donaghue*[3], which turned on the construction of 11 and 12 Vict. C. 21, Ss. 7 and 27. It lays down that the Official Assignee is not entitled to the subsequent salary or income except by means of an order obtained under S. 27 (corresponding to S. 60). I am of opinion that only so much of the salary as is ordered by the Court under S. 60 (2) to be paid to the Official Assignee vests in him. In this case an order having been made under S. 60 (2) of the Act, only the amount ordered by the Court vests in the Official Assignee; at any rate the balance was at the absolute disposal of the insolvent.

Assuming that the rest of the income did not vest in the Official Assignee, can the insolvent pay one creditor in full out

1. (1882) 21 Ch. D. 85.
2. (1892) 1 Q.B. 522.
3. (1894) I.L.R. 19 Bom. 232.

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of his subsequent salary? No doubt, the insolvency law aims at equal and rateable distribution of the assets of the insolvent among his creditors without any preference of one creditor over another. The bank, in the absence of any assignment or charge, is only in the position of an ordinary creditor entitled to prove in the insolvency for its debt. It is opposed to the very spirit of the insolvency law that a creditor who is entitled merely to share equally with the other creditors in the distribution of the assets of the insolvent should receive payment in full of his amount. He cannot be allowed to have any such advantage by any act of the insolvent. But the allocation under S. 60 (*2*) of the Act has been made and the rest of the salary is absolutely at the disposal of the insolvent. If he had spent the whole of it himself the Official Assignee cannot complain. On this ground I think the Official Assignee cannot recover from the respondent the monies in question.

There is one other aspect, namely, that the letter of the Official Assignee, Exhibit D-1, may amount to a voluntary payment. By this letter the Official Assignee permitted the bank to collect the amount from the railway company and the bank did so. Suppose the Official Assignee had collected the whole amount and that he afterwards paid the sums to the bank, they would be voluntary payments which the Official Assignee cannot recover.

I am of opinion that in this case the Official Assignee's conduct does bring the case within the rule that a voluntary payment cannot be recovered.

I cannot however leave this case without strongly commenting on the conduct of the Official Assignee in having written such letters. There was no necessity for the Official Assignee to have written such letters as Exhibit D-1 or Exhibit D-2 and it was not proper on his part to have done so. It was not in the interests of the creditors. He is not called upon to give advice to the banks and he ought not to do anything which might prejudice the creditors.

The allocation was evidently fixed very low by the Master on the representation that the payment to the respondent bank should be taken into account when fixing the allocation. I have held that the respondent had no preferential right to be paid these sums from the salary. The first one hundred rupees and

a half of the excess over one hundred are exempt from attachment; and there is no reason why the balance at least should not be required to be paid for the benefit of the creditors. That should be the ordinary rule in fixing the amount under S. 60 (2). In the result this application is dismissed but without costs as the respondent has failed in many of its contentions.

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The Official Assignee will have his costs out of the estate.

K. S. *Application dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE SOMAYYA.

Syed Gaffar Sahib .. *Petitioner** (*Accused*) (*Petitioner—Appellant*).

Syed Gaffar Sahib. *In re.*

Madras Prohibition Act (*X of* 1937), *S.* 4 (1) (a)—*Unlawful possession of arrack—Offence—Conviction and sentence*—Ultra vires *nature of legislation—Government of India Act* (1935), *Sch, VII cl.* 31—*Limits of Provincial Legislation.*

The accused was convicted and sentenced under S. 4 (1) (*a*) of the Madras Prohibition Act of being in unlawful possession of a quantity of arrack. An application was made for quashing the conviction on the ground that in prohibiting the possession of intoxicating liquor the Madras Prohibition Act was *ultra vires* the Provincial Legislature.

Held, that as the case was merely concerned with the possession of arrack manufactured in the Madras Presidency and not with export or import across frontiers the plea of *ultra vires* was unsustainable. The Provincial Legislature having power to prohibit the possession of arrack and the petitioner having been found in possession of such liquor the conviction was a lawful one.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying that the High Court will be pleased to revise the judgment of the Court of the Joint Magistrate of Tirupattur dated 16th December, 1940, and passed in Crl. Ap. No. 70 of 1940 preferred against the judgment of the Court of the Stationary Sub-Magistrate of Gudiyattam dated 9th November, 1940, and passed in C. C. No. 1307 of 1940.

T. S. Venkataraman and *G. Venkatarama Sastri* for Petitioner.

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* Crl. R. C. No. 273 of 1941 (Crl. R. P. No. 259 of 1941). 24th March, 1941.

Syed Gaffar Sahib, *In re.*

The Court's order was passed by

The Chief Justice.—The petitioner has been convicted under S. 4 (1) (*a*) of the Madras Prohibition Act of being in unlawful possession of a quantity of arrack and sentenced to pay a fine of Rs. 100 and in default to undergo rigorous imprisonment for three months. The Court is asked to quash the conviction and sentence in the exercise of its powers of revision on the ground that in prohibiting the possession of intoxicating liquor the Madras Prohibition Act is *ultra vires* the Provincial Legislature but this contention obviously cannot be accepted so far as this case is concerned.

Cl. 31 of the Provincial Legislative List in the seventh schedule to the Government of India Act 1935 gives the Provincial Legislature full power to legislate with regard to the production, manufacture, possession, transport and sale of intoxicating liquors. S. 4 (1) (*a*) of the Prohibition Act prohibits *inter alia* the possession of intoxicating liquors. It is said that the Act is *ultra vires* the Provincial Legislature, because Cl. 19 of the Federal Legislative List places in the Central Legislature the power to legislate with regard to "import and export across frontiers as defined by the Federal Government". In this case there is no question of any import or export. The case is merely concerned with the possession of arrack manufactured in the Madras presidency. The Provincial Legislature having power to prohibit the possession of arrack and the petitioner having been found in possession of such liquor the conviction was a lawful one.

The petition will be dismissed and as we do not consider that the case involves a substantial question of law as to the interpretation of the Government of India Act, 1935 we do not feel called upon to give a certificate under S. 205. It may be added that no certificate has been asked for.

B. V. V. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE LAKSHMANA RAO.

The Public Prosecutor, Madras .. *Appellant**

v.

Panchakarla Sooramma .. *Respondent (Accused).*

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* Crl. Appeal No. 457 of 1940. 25th October, 1940.

Public Prosecutor *v.* Panchakarla Sooramma.

Madras Prevention of Adulteration Act (III of 1918), S. 20—Rr. 27 and 29—Sale of milk containing water—Offence made out.

The accused was selling milk near a Railway station and the Sanitary Inspector purchased half a seer of milk for sample. The milk was found to contain 14 per cent. of water, and she was prosecuted under the Madras Prevention of Adulteration Act.

Held, that the accused was liable to be convicted under rr. 27 and 29 framed under S. 20 of the Madras Prevention of Adulteration Act, and her acquittal on the ground that the milk was not otherwise adulterated was not sustainable.

Appeal under S. 417 of the Code of Criminal Procedure, 1898, against the acquittal of the aforesaid respondent (accused) by the Stationary Sub-Magistrate of Cocanada dated 16th February, 1940, in C. C. No. 1514 of 1939 on his file.

Appellant in person.

Respondent not represented.

The Court delivered the following

JUDGMENT.—This is an appeal by the Provincial Government against the acquittal of respondent of an offence under rr. 27 and 29 framed under S. 20 of the Madras Prevention of Adulteration Act.

The respondent, a golla woman, was selling milk near the Railway station and the Sanitary Inspector purchased half a seer of milk for sample. The milk was found to contain 14 per cent. of water and r. 27 of the rules framed under S. 20 of the Madras Prevention of Adulteration Act provides that no person shall add any water to milk intended for sale or offer for sale milk to which any such addition has been made. R. 29 makes a breach of that rule punishable with fine and the purity of the milk is immaterial. The respondent would therefore be guilty under rr. 27 and 29 and her acquittal on the ground that the milk was not otherwise adulterated is unsustainable. The appeal is therefore allowed and the order of acquittal is set aside. The respondent is convicted under rr. 27 and 29 framed under S. 20 of the Madras Prevention of Adulteration Act and sentenced to pay a fine of Rs. 10, with simple imprisonment for one week in default.

K. S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT—MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

Mutha Venkateswarlu .. *Petitioner** (*Plaintiff*)

v.

Kotha Venkatraju .. *Respondent* (*Defendant*).

Venkateswarlu *v.* Venkatraju

Madras Agriculturists' Relief Act (IV of 1938), Ss. 8 and 9—Scope—Partition of debt between the creditors and execution of separate promissory notes by same debtor—Effect.

A promissory note was executed on 15th May, 1930, in favour of two brothers *A* and *B*. On a partition after *B's* death, of the amount due under the note equally, between *A* and *B's* son the debtor executed separate promissory notes on 29th October, 1934, one in favour of *A* and the other in favour of *B's* son. In an application for scaling down,

Held, that the principle laid down in *Ramasubbier* v. *Rama Aiyar*, (1941) 1 M.L.J. 39, governed the case. The division of the original debt into two equal halves does not affect the principle that where a single debt is superseded by two new and separate debts each in favour of one of the two persons who were jointly entitled, there is no renewal of the original debt as contemplated in the explanation to S. 8 of Act IV of 1938 and the debt in this case must be scaled down under S. 9 of the Act.

Petition under S. 25 of Act IX of 1887, praying that the High Court will be pleased to revise the decree of the Court of the District Munsif of Cocanada dated the 19th September, 1938, and passed in S.C. S. No. 876 of 1937.

C. S. Swaminathan for Petitioner.

M. Krishna Bharathi for Respondent.

The judgment of the Court was delivered by

Wadsworth, J.

Wadsworth, J.—This Civil Revision petition arises out of a Small Cause suit and raises questions under Ss. 8 and 9 of Madras Act IV of 1938. The suit debt relates back to an original promissory note Ex. B dated the 15th May, 1930, executed by the first defendant in favour of the plaintiff and his brother Krishnamurthi. Krishnamurthi died and after his death the plaintiff and Krishnamurthi's son agreed that the balance due under Ex. B should be divided between them in equal shares. The debtor accordingly executed two fresh promissory notes, one in favour of the plaintiff which is the suit promissory note (Ex. A) and the other in favour of Krishnamurthi's son. The lower Court has treated Ex. A as a renewal of Ex. B to the extent of plaintiff's share in that debt

* C. R. P. No. 239 of 1939. 13th February, 1941.

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—
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and has scaled down the debt applying the explanation to S. 8 of the Act. It seems to us that this conclusion cannot be supported in view of our decision in the case of *Ramasubbier* v. *Rama Aiyar*[1]. We had to deal there with a debt due to one Srinivasa Aiyar who died and after his death there was a partition between his two sons and two fresh promissory notes were executed for unequal amounts, one in favour of each of the two sons. We held in scaling down the claims in the two suits on these two promissory notes, that the debtor was not entitled to go back to the original promissory note in favour of the father. We observed that:

"The explanation to S. 8 requires that the debt must continue in substance to be the same though the amount and the parties under the various documents given as vouchers for it need not be strictly identical. This requirement cannot be regarded as satisfied when the debt is divided among the heirs of the creditor and the debtor executes a separate instrument for a part of the debt in favour of each of such heirs."

An attempt has been made to distinguish that case from the present on two grounds: Firstly because that was a case of an original debt to the father superseded by two separate debts to the sons and not, as in the present case, a joint debt superseded by two separate debts. The other ground of distinction is that the earlier case was one of a division of the original debt into two unequal amounts, whereas here we are concerned with a division into two halves. The first distinction seems to us more apparent than real. In *Ramasubbier's case*[1], the father (the original debtor) died and on his death his two sons would be jointly entitled to the debt, so that the position when the two separate promissory notes were executed was practically the same as the position in the present case, namely, a joint debt in favour of two brothers superseded by two separate debts one in favour of each. The distinction on the basis of the disparity of the amount of the two promissory notes is a distinction which might possibly have force if the decision in *Ramasubbiers case*[1], had been influenced by the fact that the amounts of the two new promissory notes were unequal. But it does not appear to us that that was the basis of the decision at all. The basis for the decision was that a single debt was superseded by two new and separate debts each in favour of one of the two persons who were jointly entitled. No doubt, the fact that the new debts were for unequal amounts makes the

1. (1941) 1 M.L.J. 39.

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Wadsworth, J.

danger of treating them as identical with the original debt more apparent, but the principle is the same whether the new debts are equal or unequal.

We are of opinion therefore that the debtor is not entitled on the facts of the present case to treat the promissory note (Ex. A) as a renewal of the earlier promissory note (Ex. B). Ex. A was executed on the 29th September, 1934 and it has to be scaled down under S. 9 of the Act. The revision petition is therefore allowed with costs and there will be a decree for the principal amount due under the promissory note with interest at five per cent. up to 22nd March, 1938, credit being given to the two payments endorsed on the note as on the dates on which they were paid and for subsequent interest on the aggregate amount at six per cent. Proportionate costs will be allowed to the plaintiff in the lower Court.

K. S. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE LAKSHMANA RAO.

The President, Pakkam Panchayat Board .. *Petitioner* (Complainant)*

v.

Munuswami Reddy .. *Respondent (Accused).*

Pakkam Panchayat Board v. Munuswami Reddi.

Madras Local Boards Act (XIV of 1920), S. 207—Offence under—Objection petition of accused—Disposal not communicated—Acquittal—Permissibility.

Where the Magistrate in effect finds the accused guilty of an offence under S. 207 of the Madras Local Boards Act he cannot be acquitted on the ground that the result of his objection petition was not communicated to him.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying that the High Court will be pleased to revise the judgment of the Court of the Stationary Second Class Magistrate of Trivellore dated 27th June, 1940, and passed in C. C. No. 22 of 1940.

V. Ramaswami Aiyar for Petitioner.

The Public Prosecutor for the Crown.

Respondent not represented.

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* Crl. R. C. No. 635 of 1940 (Crl. R. P. No. 596 of 1940). 29th November, 1940.

Pakkam Panchayat Board v. Munuswami Reddi.

The Court passed the following

ORDER.—The Sub-Magistrate has in effect found the accused guilty of the offence under S. 207 of the Madras Local Boards Act and the acquittal of the accused on the ground that the result of his objection petition was not communicated to him is unsustainable. The acquittal is therefore set aside and there will be a re-trial of the accused in accordance with law.

B. V. V. *Retrial ordered.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

Bendapudi Venkataratnam and others .. *Appellants** (*Petitioners*) (*Respondents*).

Venkataratnam, *In re.*

Court-Fees Act (VII of 1870), Sch. II, Art. 11—Applicability—Madras Agriculturists' Relief Act (IV of 1938)—Appeal preferred under r. 9 of the rules—Court-fee payable.

In the case of an appeal filed under r. 9 of the rules framed under the Madras Agriculturists' Relief Act IV of 1938 court-fee is payable under Art. 11 of Sch. II of the Court-Fees Act.

Appeal against the order of the Court of the Subordinate Judge of Rajahmundry dated the 11th September, 1940, and made in O. P. No. 21 of 1940 etc.

N. Narasimham, A. Lakshmayya, Y. Suryanarayana and *V. Rangachari* for Appellants.

The Government Pleader for the Government.

The Court's order was passed by

Wadsworth, J.

Wadsworth, J.—The question which we have to decide relates to the court fee payable on an appeal filed under r. 9 of the rules framed under the Madras Agriculturists' Relief Act (IV of 1938) and issued under G. O. No. 2634. These rules provide for an application either by the debtor or by the creditor for a declaration as to the amount of the debt due. It is expressly provided that the application shall not be maintainable under the rules if a suit for the recovery of the debt be pending and it is also provided that every such application shall bear a court-fee stamp of the value of twelve annas. R. 9 states that the order of the Court declaring the amount of the

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* S.R. Nos. 33204, 33470, 30289 and 33198 of 1940. 24th March, 1941.

Venkataratnam, *In re.*

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debt under r. 7 shall be 'subject to appeal and second appeal as if it were a decree in an original suit' and it was the view of the office that the effect of this provision is to make appeals preferred against orders declaring the amount of a debt taxable as appeals from declaratory decrees under Art. 17-A of the Court-Fees Act as amended in Madras. The authority relied upon for this view is a decision of Burn, J., on the effect of a similar provision in S. 50 (2) of the Malabar Tenancy Act which provides that appeals shall lie from orders made under S. 12 etc., as if they were decrees in suits.

It is evident that the orders against which appeals are filed in these cases are very much to the same effect as decrees in declaratory suits. They finally decide as between the parties the amount due on the debt; these decisions will be binding in future litigation and they cannot of themselves be executed. There is no specific article in the Court-Fees Act laying down what shall be the court-fee payable on appeal from an order which is appealable 'as if it were a decree' but questions similar to that which we have now to decide have come before the Courts on numerous occasions. Under O. 21, r. 50 (3) of the Code of Civil Procedure the Court is concerned with an order which shall 'have the same force and be subject to the same conditions as to appeal or otherwise as if it were a decree' and it has been held that under this provision the appeal is to be stamped with an *ad valorem* fee as an appeal from a decree. But then it must be noticed that the words 'or otherwise' show that the order which is to have the force of a decree is to be governed by the same conditions not only with reference to the procedure in appeal but also in other respects. One of such decisions is in *Jugal Kishore Gulab Singh* v. *Dina Nath-Siri Ram*[1]. There are two cases which have been cited before us which deal with statutory provisions that an order shall be subject to appeal as if it were a decree. One is in *Jamsang Devabhai* v. *Goyabhai Kikabai*[2], in which it was held that though the procedure in appeal was that for an appeal from a decree, the appeal was not governed by the provisions of the Court-fees Act relating to appeals from decrees and that it must be treated as a mere application falling under Article I of Schedule II. A similar view was taken by a Full Bench of the Calcutta High

1. (1934) I.L.R. 15 Lah. 893.

2. (1891) I.L.R. 16 Bom. 408.

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Court in *Upadhya Thakur* v. *Persidh Singh*[1]. Both of these cases have been quoted with approval by a Bench of this Court in *Rodrigues* v. *Mathias*[2], which, though concerned with a rather different matter, had to consider what is the proper article of the Court-Fees Act to apply. The learned Government Pleader has relied on decisions mainly relating to proceedings in execution under special statutory provisions rendering an order under the special statute executable as a decree and these decisions have held that such a provision attracts all the procedure including the right of appeal laid down for execution petitions in the Code of Civil Procedure and also attracts the law of limitation for the execution of decrees and orders of a Civil Court under Art. 192 of the Limitation Act. An instance of such a decision under the Co-operative Societies Act is in *Subba Rao* v. *Calicut Co-operative Urban Bank Ltd., Calicut.*[3] *Sundara Aiyar* v. *Commissioners, Hindu Religious Endowments Board, Madras*[4], is one of a number of cases which have been quoted before us under the Madras Hindu Religious Endowments Act. It seems to us that these decisions have no direct bearing on the point which we have to decide. Granted that when it is laid down that an order shall result in a certain procedure the whole of that procedure will be applicable including the law of limitation and the law relating to appeals, it does not necessarily follow that a fiscal statute such as the Court-Fees Act shall be applied as if the order under appeal were that which it is expressly not. If in fact the declaration under r. 7 were a decree, it would be unnecessary to enact r. 9 which provides that it shall be appealable as if it were a decree. The rules proceed on the basis that there is a mere application resulting in a declaratory order which is not a decree, but which for purposes of appeal is to be treated as if it were a decree. It is contended that if this order is to be treated for purposes of appeal as if it were a decree, it must necessarily attract the provisions of the Court-Fees Act for appeals from decrees. We are unable to accept this contention in the absence of any specific provision in the rules attracting the provisions of the Court-Fees Act governing appeals from decrees. The Court-Fees Act being a fiscal statute, we cannot

1. (1896) I.L.R. 23 Cal. 723 (F.B.).
2. (1911) 21 M.L.J. 481.
3. (1940) 1 M.L.J. 268.
4. (1928) 56 M.L.J. 373: I.L.R. 52 Mad. 388.

Venkataratnam, *In re.*

Wadsworth, J.

in the presence of an ambiguity guess at the meaning of the authority which enacts the rules and draw from the presumed intentions of that authority an inference which is adverse to the party who has to pay the tax. Art. 17-A applies in terms to a plaint or memorandum of appeal in a suit. We are not concerned with a memorandum of appeal in a suit. We are concerned with a memorandum of appeal in an application, the order in which is made appealable as if it were a decree. It seems to us that Art. 11 of Schedule II directly covers an appeal of this kind. Art. 11 applies to a memorandum of appeal when the appeal is from an order inclusive of an order determining any question under S. 47 or S. 144 of the Code of Civil Procedure. This Article was not applied in the two cases cited above, *Jamsang Devabhai* v. *Goyabhai Kikabhai*[1], and *Upadhya Thakur* v. *Persidh Singh*[2], apparently because of the different wording of the Article of the Indian Court-Fees Act with which the learned Judges were concerned. But there is nothing in Art. 11 of Schedule II as amended in Madras which would exclude the applicability of that Article to cases such as these. We are therefore of opinion that the proper Article of the Court-Fees Act to apply to these cases is Art. 11 of Schedule II.

B.V.V. *Order made.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PANDRANG ROW AND MR. JUSTICE SOMAYYA.

Swayampakula Subbaramayya and others. *Appellants** (*Defendants*)

v.

Swayampakula Venkatasubbamma and others. *Respondents* (*Plaintiffs*)

Subbaramayya *v.* Venkatasubbamma.

*Hindu Law—Marriage—*Anuloma *marriages—Not valid in the present age.*

Anuloma marriages though recognised by several of the ancient Smriti writers have ceased to be regarded as permissible under the later Hindu law. In the absence of a custom or enactment to the contrary the only legal course is to treat such marriages as invalid in the present age.

Texts and authorities exhaustively reviewed.

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1. (1891) I.L.R. 16 Bom. 408.
2. (1896) I.L.R. 23 Cal. 723 (F.B.).

* Appeal No. 33 of 1939. 5th February, 1941.

Subbaramayya v. Venkatasubbamma.

Appeal against the decree of the District Court of Nellore in O. S. No. 22 of 1936.

The Advocate-General (Sir A. Krishnaswami Aiyar), M. S. Ramachandra Rao and *D. R. Krishna Rao* for Appellants.

P. V. Rajamannar and *K. Subba Rao* for Respondents.

Their Lordships delivered the following

Pandrang Row, J.

JUDGMENTS. *Pandrang Row, J.*—My learned brother has prepared a judgment dealing with both the points that arise in this appeal, namely, the question of fact whether there was a form of marriage gone through by the first respondent with the deceased Janakiramamoorthy and the question of law whether such a marriage is valid according to Hindu law. I have had an opportunity of seeing that judgment and it would have been unnecessary for me to deliver a separate judgment of my own but for the fact that, on the question of the factum of the marriage, I find myself unable to agree with the conclusion arrived at by my learned brother. I am of opinion that no sufficient reason has been shown for disturbing the finding of the trial Judge on this point.

* * * * *

[Then his Lordship discussed the evidence and concluded that there was an actual marriage.]

On the other point, however, I find myself in full agreement with my learned brother, and, as the subject will be dealt with very fully by him in his judgment, it seems hardly necessary for me to say more than a few words on that part of the case. The question also has been discussed at considerable length and in an exhaustive manner by the learned author of Mayne's Hindu Law, 10th edition, paras 123 to 127. What has been said by the learned author in his book and what will be said by my learned brother in his judgment which is about to be delivered more or less exhaust everything useful that can be said on the topic and I need only add a few general words of mine own. There is no doubt, in my opinion, that though *anuloma* marriages were recognised by several of the Smriti writers, at the same time and almost in the same breath they were condemned. This recognition *cum* condemnation by the Smriti writers ripened later on into a definite prohibition by the time of the Puranas, for we find that in the Puranic period such marriages were regarded as improper and invalid, the

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reason given for this change by the commentators being that such marriages were regarded as not permissible during the Kali age. This sort of change in the law unconsciously brought about by the general acceptance of the views of the text writers and the Puranas by the community is not uncommon. There are other subjects in which the old Hindu law has been similarly modified or has become obsolete. Whether the word used is *ananushteeyam* or *varjyam* it is very clear that, after the Puranic period and certainly after the well known commentators wrote their commentaries, marriages of this kind, especially marriages between a Brahmin and a Sudra girl, were universally regarded as not permissible under the law during the Kali age. After all, much importance cannot be attached to what is contained in the texts of the Smritis or what the commentators have said, in the absence of the real sanction behind what the Smritis and the commentators have written, namely, the sanction of long usage and acceptance by the community, which alone gives the contents of these Smritis and the commentaries their real force as law. My learned brother has been able to find some corroboration of the actual usage in the Hindu community from the accounts of travellers from the seventh century A. D. onwards. There has been, as pointed out by him, an invariable usage not to permit marriages between a Brahmin and a Sudra girl for at least a thousand years past and this in my opinion affords very strong corroboration of the view which one arrives at independently that marriages of this kind, though permitted in very ancient times, had ceased to be regarded as permissible under the later Hindu law. Indeed the final conclusion expressed by Mr. Srinivasa Aiyangar in his book[1] in paragraph 127 appears to me to be quite correct, namely:

> "Whatever may be the correct interpretation of the Mitakshara on the point, marriages between members of different castes have been prohibited and discontinued by the usage of the community for such a length of time that the only legal course is to treat them as invalid except where there is a custom or enactment to the contrary."

There is no such custom or enactment pleaded in this case.

The result is that the appeal must be allowed and the decree of the Court below set aside and the suit dismissed. Plaintiffs 1 and 3 will be at liberty to claim maintenance on the

1. Mayne's Hindu Law, 10th edition.

footing of a permanently kept concubine and an illegitimate son respectively in a separate suit, if so advised. We do not think it necessary or desirable that we should deal with this aspect of the case for it was made clear in the Court below by the first plaintiff in her evidence that she did not want any relief except on the footing that she was the lawfully wedded wife of Janakiramamoorthy and there is no reason why any other claim should be considered in this appeal. Subba-ramayya v. Venkata-subbamma.

The appellants will have their costs of the appeal in this Court, and the costs in the lower Court will be borne by the parties themselves.

Somayya, J.

Somayya, J.—This is an appeal preferred by the defendants against the decree of the District Court of Nellore in O. S. No. 22 of 1936 which was a suit brought by three plaintiffs for recovery of maintenance from the estate of one Swayampakula Janakiramamoorthy who died on the 17th of June, 1935.

Defendants 1 to 3 are the sons of Janakiramamoorthy and the fourth defendant is his wife. They are all Brahmins to which caste Janakiramamoorthy belonged. Plaintiffs claim that the first plaintiff who is a Kapu or Sudra was married to Janakiramamoorthy and that plaintiffs 2 and 3 are the daughter and son born of Janakiramamoorthy by the first plaintiff.

The defendants who are the Brahmin wife and the sons by the Brahmin wife deny that the first plaintiff was ever married to Janakiramamoorthy and state that the marriage even if true is invalid under the Hindu law. Two questions arise (1) whether there was in fact a marriage between the first plaintiff and the late Janakiramamoorthy and (2) whether the marriage, even if true, is valid under the Hindu law. Both these questions were answered in the affirmative by the lower Court and the plaintiffs were granted maintenance at the rate of Rs. 20 per month. The defendants appeal against the said decree and repeat the objections that the marriage was not true in fact and that even if it was a fact, it is invalid in law.

The defendants raised another contention in the lower Court and urged that Janakiramamoorthy had nothing to do with the first plaintiff, that first plaintiff was not living with Janakiramamoorthy as man and wife, and that plaintiffs 2 and 3 are not his children.

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The plaintiffs adduced a large volume of evidence to show that Janakiramamoorthy was visiting the first plaintiff, that he was on terms of intimacy with her, that he took a house for her and maintained her, that plaintiffs 2 and 3 were his children born to the first plaintiff and that he acknowledged them to be his children on several occasions. Relying upon this evidence the Court below held that it is proved beyond doubt that the first plaintiff was living with Janakiramamoorthy as man and wife and that plaintiffs 2 and 3 are his children born of her. In view of the fact that this finding is not now attacked, the only questions that arise for decision are the question of fact whether there was a marriage and the question of law whether the marriage detween a Brahmin and a Sudra woman is valid under the Hindu law.

The evidence of the factum of marriage lies within a small compass.

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(After discussing the oral and documentary evidence in the case, his Lordship proceeded):

I hold that there was no marriage between the first plaintiff and the late Janakiramamoorthy.

Assuming that there was a marriage between Janakiramamoorthy and the first plaintiff, the question is whether it is valid under the Hindu law. The first plaintiff is a Sudra and Janakiramamoorthy was a Brahmin. The marriage was thus between a Brahmin and a Sudra woman and is known in Hindu law as '*anuloma* marriage'. The appellants contend that marriages between members of different castes as opposed to members of different sub-castes are invalid. On the other hand, the respondents urge that whereas a marriage between a woman of a higher caste and a man of a lower caste or a *pratiloma* marriage as it is called may be invalid, a marriage between a man of a superior caste and a woman of an inferior caste is not invalid and point out that an *anuloma* marriage has been recognised by all ancient Smriti writers, that their works contain rules for the performance of such a marriage and provide for a share to be given to the sons of such a marriage. The learned Advocate-General who appeared for the appellants did not urge that *anuloma* marriages were not recognised by the ancient Smriti writers. His whole argument is that even the

Smriti writers without any exception condemned such marriages though they recognised the existence of such marriages in their times, that by the time of the Puranas these marriages were prohibited as unsuited for the Kali age and that the Nibhandhakaras or commentators prohibit these marriages altogether as unsuited for this age. He urges that several centuries ago this form of marriage became obsolete and that therefore, if performed at the present day, such a marriage is illegal.

We therefore start with this that all the Smriti writers recognised this form of marriage as a lawful marriage. That they condemned it at the same time is clear; and we may in this connection refer to the texts of two of the Smriti writers. Manu, Chapter III, verses 12 and 13 recognise that a Brahmin may take a Sudra wife. Then verse 14 says:

"In no history or chronicles can be found that, even in the time of distress, a Brahmana or a Kshatriya has (lawfully) married a Sudra wife."

Verse 16 says:

"He, who marries a Sudra woman, becomes degraded . . . . By visiting a Sudra wife for the purpose of begetting offspring on her, a twice-born one becomes degraded."

Verse 17 says:

"By lying with a Sudra woman in his bed, a Brahmana falls into degraded existence; by begetting a child on her he stands divested of his Brahmanism."

Yajnavalkya, Chapter I, sloka 56 says:

"There is a saying that twice-born ones can get their wives from among the Sudras. I do not approve of it. For the *atman* (Self) itself is born there, that is, in the wife as a son."

Both Manu and Yajnavalkya, while recognising the existence of *anuloma* marriages and providing for the rights of the Sudra wife and her offspring, have expressed their strong disapproval of such marriages and Yajnavalkya personally prohibits them altogether.

Then we come to the Nibandhakaras or commentators. The commentators take the Smriti of Manu, Yajnavalkya or Parasara as their text and comment upon it and incidentally refer to the other Smriti writers and sages and sometimes they give their own opinion. Medhathithi and Kulluka are well known commentators on Manu. The Mitakshara is the principal commentary on Yajnavalkya Smriti and Viswarupa and Apararka have also written commentaries on the Yajnavalkya Smriti. Parāsara Madhaviyam is a commentary on

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Parasara Smriti. Dayabhaga is an independent work by Jimutavahana. As is well known, the Dayabhaga prevails in Bengal and the contiguous places and the Mitakshara in the rest of India. There are also commentaries on Mitakshara and Dayabhaga which are also of very high value and of recognised authority yielding only to the Mitakshara or the Dayabhaga when there is a conflict. On points on which Mitakshara or Dayabhaga is silent, these commentaries prevail. We have Sri Krishna Tarkalankara who is the author of Dayakramasangraha, a commentary on Dayabhaga. Balambhatti and Subodhini are commentaries on Mitakshara. In addition to these, we have two works which are regarded in Southern India as of very high authority. These are Parasara Madhaviya which is a commentary on Parasara Smriti and Smriti Chandrika which is an independent work and not a mere commentary.

We have the Mayukha of Nilakanta whose authority prevails in the island of Bombay, Gujaret and in North Konkan.

Some of these commentaries expressly prohibit *anuloma* marriages as unsuitable for Kali age. They refer to this or that Purana as the authority. Some of them even refuse to discuss those portions of the Smritis regulating the rights of the issue of *anuloma* marriages on the ground that such marriages being prohibited for this age, a discussion of the rights of the children would be a mere waste of time. The Smriti Chandrika, which in this part of the country is regarded only as next to the Mitakshara, says in Chapter X, verse 7:

"Even a son of the body does not become a legitimate son when he is born of a wife of an unequal class, the marriage of a woman of an unequal class being in itself prohibited in the Kali age. Accordingly Dharmajnya: 'The marriage of girls of an unequal class by twice-born men'. Add to these, 'is prohibited by the great in the Kali age, in view to maintain virtue.' We have not therefore detailed the laws relating to partition of property among sons of unequal classes, secondary sons (an adopted son excepted), appointed daughters and the sons of such daughters, as it would tend in vain to swell the work; such a partition being in the present age obsolete."

This is the translation given by Mr. T. Krishnaswami Aiyar in his translation of Smriti Chandrika published in the year 1867. On reference to the original the Sanskrit expression corresponding to the word 'obsolete' is '*ananushtiya*' (अननुष्ठीय). It is urged by Mr. Rajamannar for the respondents that the expression '*Samprathi ananushtiyamanathwat*' has not been correctly translated by Mr. Krishnaswami Aiyar and

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that the correct translation is not that it is now obsolete but 'it ought not to be observed or practised in these days.' I do not think it matters much whether we take the one or the other translation. There is a distinct prohibition against such a marriage and there is also the fact that the author even refuses to discuss the rights of inheritance of the children on the ground that it is a waste of time. It will be observed that he treats the sons born of marriages of persons belonging to different castes, secondary sons except the adopted son, and appointed daughters and their sons, all on the same footing and declines to discuss their rights as being a waste of time. It is undoubted that the system of appointed daughters and appointed daughters' sons and secondary sons (except adopted son) has long become obsolete. In *Nagindas Bhagwandas* v. *Bachoo Hurkissondas*[1], the Judicial Committee laid down at page 287:

> "It was endeavoured to establish that proposition by reference to the place which was assigned by Manu and other early authorities to the twelve then possible sons of a Hindu. As to this contention, it is sufficient to say that whatever may have been the position and rights between themselves of such twelve sons in very remote times, all of these twelve sons, except the legitimately born and adopted, are long since obsolete. A discussion as to their rights and interests, even if they could now be ascertained, would be beside the point. . . . . Hindu law and customs have not stood still, and what we are concerned with is the position at the present time of an adopted son in a Hindu family."

As regards the position of an appointed daughter and an appointed daughter's son it is enough to refer to the decision of this Court in *Sri Rajah Venkata Narasimha Appa Row* v. *Sri Rajah Suraneni Venkata Purushothama Jagannadha Gopala Row*[2].

The translation by Krishnaswami Aiyar of the word 'अननुष्ठेय' as 'obsolete' correctly describes the situation as regards secondary sons other than adopted son and the appointed daughter's son. The author treats these two and the case of the sons of ***anuloma*** marriages on the same footing. If these institutions were still in observance, the author would not have dismissed them in this summary fashion. We think that Krishnaswami Aiyar's rendering brings out the real meaning of the author.

Parasara Madhaviyam is a work of a very great scholar known as Vidyaranya, who was a Prime Minister of the Kings

1. (1915) 30 M.L.J. 193: L.R. 43 I.A. 56: I.L.R. 40 Bom. 270 (P.C.).
2. (1908) 18 M.L.J. 420: I.L.R. 31 Mad. 310.

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of the Vijayanagar Dynasty. He is said to have flourished, as is pointed out in Mayne's Hindu Law, tenth edition, pages 50 and 51, in the fourteenth century. Being a great scholar and also the Prime Minister of the great Vijayanagar kingdom, his opinion is entitled to very great weight. In volume I, part 2, pages 97 and 98 (Parasara Dharma Samita, edited by Pandit Vaman Sastri Islampurkar, printed in 1893, Bombay Sanskrit series, 48), he says:

'युगभेदेन व्यवस्था च स्मृत्यन्तरे स्पष्टीकृता—

'असवर्णासु कन्यासु विवाहश्च द्विजातिभिः' ।

इत्यादिमनुक्रम्य—

'कलौ युगेत्विमान् धर्मान् वर्ज्यानाहुर्मनीषिणः' इत्युपसंहारात् ।"

"Distinguishing the different ages, the law is clearly established by a Smriti, which referring to the marriage of persons of any of the twice-born castes with persons of the other castes, declares 'that the learned say that these practices must not be followed in the age of Kali'."

Apararka is one of the principal commentators on Yagnavalkya. His authority has been acknowledged by the Privy Council in *Buddha Singh* v. *Laltu Singh*[1]. In commenting on slokas 128 to 132 of Yajnavalkya he points out that in the Kali age the son of a Sudra wife is not in vogue. To understand his statement we must refer to the definition of "*aurasa*" as given by Yajnavalkya in verse 128 where he says: "औरसो धर्मपत्नीजः".

Commenting on this definition, Apararka says this:

"यो धर्मपत्नीजः स औरसो ज्ञेयः । यया सह धर्मश्चर्यते सा धर्मपत्नी । यद्यपि पत्नीशब्देनैव सहधर्मचारिणी कथ्यते, तथाऽपि धर्मशब्दोपादानादत्र पत्नी शब्दो भार्यामात्रपरः । धर्मपत्नी शब्देन शूद्रा व्यावर्त्यते, तस्याः सहधर्मचारित्वाभावात् । यदाह वसिष्ठः—"कृष्णवर्णा वै रामा रमणायैव न धर्माय" इति ।"

(Anandasrama Edition 1904, Part II, page 734).

As translated in, (Journal portion)[2]:

"He who is born of the *dharmapatni* (wife) is known as the *aurasa* son. She with whom he observes his religious duties is the *dharmapatni*. Though even the term *patni* (by itself) indicates companionship in religious duties, yet by the use of the term *dharma* here *patni* means only wife. By the term

1. (1915) 29 M.L.J. 434: L.R. 42 I.A. 208, 221: I.L.R. 37 All. 604, 617, 618.
2. 21 M.L.J. 254.

dharmapatni the Sudra wife is excluded because of the absence of her companionship in religious duties."

Vasishta says:

"A Sudra wife is only for conjugal felicity and not for religious duties."

Verse 132 of Yajnavalkya runs thus:

पिण्डदोंऽश हरश्चैषां पूर्वाभावे परः परः ।

"Of these, the one succeeding, in default of all preceding, gives the pinda and takes the wealth."

In commenting on this, Apararka says:

एषामुक्तानामौरसादीनां मुख्यामुख्यपुत्राणां मध्ये पूर्वस्य पूर्वस्याभाव उत्तर उत्तरः श्राद्धदाने धनादाने चाधिक्रियते । पुत्रप्रतिनिधीनां मध्ये दत्तक एव कलियुगे ग्राह्यः । अत एव कलौ निवर्तन्त इत्यनुवृत्तौ शौनकेनोक्तम्—

"दत्तौरसेतरेषां तु पुत्रत्वेन परिग्रहः" इति ।

(Anandasrama Edition 1904, Part II, page 739).

It is correctly translated in, (Journal portion)[2] thus:

"Of the sons mentioned, *aurasa* etc., primary as well as secondary, in default of the preceding *i.e.*, preceding son, the succeeding that is, the succeeding son, is authorised to give (sraddha) pinda and to take the wealth. Of the substitutes of a son, only the adopted son is accepted in Kaliyuga. Therefore only, it is mentioned by Saunaka when dealing with things not in vogue in the Kaliyuga:

'The acceptance of all others except the *aurasa* (son) and the adopted (son) in the place of son' is mentioned among things not in vogue."

The term "*aurasa* son" or "Dharmapatnija" as defined by Yajnavalkya is rendered by Mitakshara in Chapter I, S. 11, placitum 2 thus:

"The issue of the breast (उरस्—uras) is a legitimate son (औरस—*aurasa*). He is one born of a legal wife. A woman of equal caste, espoused in lawful wedlock, is a legal wife (धर्मपत्नी—*Dharmapatni*) : and a son begotten on her, is a true and legitimate son and is chief in rank." (*See* Setlur's Book, Part I, page 30).

Viswarupa who is an earlier commentator than Vignaneswara also gives the same meaning to the terms "*aurasa* son" and 'Dharmapatni':

"Lawfully wedded wife—a wife of equal caste . . . . . .; the *aurasa* is the son begotten by him on her."

(Seetharama Sastri's translation of Viswarupa, 1900 Edition, page 8).

Thus an "*aurasa* son" as defined by Yajnavalkya, means

1. 21 M.L.J. at 305.

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according to Vignaneswara, Apararka and Viswarupa *'the son born to a wife of an equal class'*. According to Saunaka's text set out in Apararka's commentary, all other sons excepting 'a son by a wife of an equal class' and an adopted son are not in vogue. The sons by wives of unequal classes were not in vogue even in Saunaka's time or at any rate by the time of Apararka, who adopts Saunaka's text.

Nilakanta, the author of Vyavahara Mayukha, seems to me to say that the son by a wife of an unequal class is prohibited in Kali age.

In Chapter IV, S. 4, Nilakanta deals with the mode of partition. He sets out in placitum 41 the texts of Yajnavalkya relating to 12 kinds of sons including *aurasa* or *Dharmapathnijas* already referred to by me in dealing with Apararka's view.

Then we have the following: placitum 42:

सवर्णायां धर्मपत्न्यां उत्पन्नः औरसः पुत्रो मुख्यः ।

"The *aurasa*, or the legitimate son born of a lawfully married wife of equal class, is the principal son."

Then in placita 43, 44 and 45, Nilakanta sets out the secondary sons dealt with by Yajnavalkya's text and concludes in placitum 46 thus:

"अथ दत्तकाभिन्ना गौणाः पुत्राः कलौ वर्ज्याः दत्तौरसेतरेषां तु पुत्रत्वेन परिग्रहः"—इति तन्निषेधेषु पाठात् ।

"All the secondary sons mentioned here, except *dattaka* or the adopted son, are forbidden (recognition) in the Kali age"; because we read in the prohibitions (in the Kali age). "There is no acceptance as sons, of others than the *dattaka* (adopted) and an *aurasa* or legitimate sons."

This translation is from Mandlik's "Vyavahara Mayukha and Yajnavalkya Smriti" (1880 edition Part II, pages 49-50). The texts above set out are in the same book (Part I, pages 38-39).

We start in verse 42, with the definition of an *'aurasa'* as 'a son of a wife of an equal class'. Excepting the adopted son (*dattaka*) and the *aurasa* (as defined in placitum 42), there is no acceptance of other kinds of sons and they are all forbidden recognition in the Kali age. So, the son by a wife of an unequal class is forbidden, not to be recognised and there is no acceptance of him as a son.

We must read placitum 46 along with placitum 42 and then we get the opinion of Nilakanta.

Subodhini, a commentary on Mitakshara also lays down the rules just as Apararka and Nilakanta do as pointed out above. He, like them, takes the enumeration of 12 kinds of sons, gives the definition of an '*aurasa*' as a son born of a wife of an equal class, then sets out the rights of the secondary sons and winds up by saying:

"एतच्च सर्वं युगान्तरविषयम्। कलौ तु औरसदत्तकावेव, औरससमत्वात् पुत्रिका च—"दत्तौरसेतराणां तु पुत्रत्वे न परिग्रहः", इति स्मरणात्। अत्र शेषे "कलौ युगे तु इमान् धर्मान् वर्ज्यानाहुर्मनीषिणः" इति वाक्यशेषः। शिष्टाचारोऽपि तथैव दृश्यते कलौ।"

(Setlur's Mitakshara with commentaries thereon in Sanskrit (1912), Edition, page 710).

The above passage may be translated as follows:

"All this pertains to another age (Yuga); but in Kali (age), only '*aurasa*' and '*dattaka*' sons (are recognised); also *putrika* (appointed daughter) by reason of equality of status with an *aurasa*. Because it is said in a Smriti:

'There is no acceptance as sons of others than the adopted son (dattaka) and an *aurasa* or legitimate son'."

Add to this:

"That the learned say that these practices must not be followed in the age of Kali."

Even the practices of the virtuous are seen to be the same in the Kali age.

Sistachara or 'practices of the virtuous' is a recognised source of Hindu law.

In Dayakrama Sangraha of Sri Krishna Tarkalankara, a leading commentary on Dayabagha, we find in Chap. 1, S. 2, placitum 7:

"In the present age, a widow is exclusively of the same class with her late husband, since marriage with a woman of unequal class is prohibited during the Kali, or iron age."

(Setlur's Hindu Law Books, Part II, page 111).

Kamalakara in Nirnayasindhu under the heading 'कलिवर्ज्यानि' or "Prohibitions in the Kali age", says:

"The marriage of a *dwija* (twice-born) with a maiden of a dissimilar class is prohibited in the Kali age." (Nirnayasindhu, Nirnayasagara Edition 1901, page 275; *see also* Mandlik's Vyavahara Mayukha, Part II, page 218 footnote).

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Mr. Rajamannar drew our attention to Mr. Setlur's Hindu Law Books, Part I, page 24, where Vijnaneswara is said to refer to *anuloma* marriages as actually occurring during his time. In Chapter. I, S. 8, placitum *2*, it is set out thus:

"Under the sanction of the law, instances do occur of a Brahmana having four wives; a Kshatriya, three; and a Vysia, two; but a Sudra, one. In such cases, the sons of a Brahmana born to him by women of the several castes shall have four shares, three, two or one in the order of these castes."

On a reference to the original, this translation appears to be clearly incorrect. The words, 'instances do occur' do not correctly translate the Sanskrit expression 'darsitah' "दर्शिताः". This passage of Mitakshara occurs while commenting upon Yajnavalkya's text II, 125. Mr. Setlur seems to have taken this translation from Mr. Colebrooke. It is necessary to set out that passage to understand the author.

"तिस्रो वर्णानुपूर्व्येण" इति ब्राह्मणस्य चतस्रः, क्षत्रियस्य तिस्रः, वैश्यस्य द्वे, शूद्रस्यैकेति भार्या दर्शिताः। तत्र ब्राह्मणात्मजा ब्राह्मणोत्पन्ना वर्णशः।

(Setlur's edition, page 667).

No doubt Vignaneswara took the text of Yajnavalkya II, 125, and wrote his commentary, that it was pointed out, that is, by the author Yajnavalkya that four wives for Brahmins etc., were pointed out, but that does not mean that at the time when Vijnaneswara was writing the Mitakshara he chronicles an existing fact. Several other commentaries like the Mitakshara take the above and other texts of Yajnavalkya and expound the meaning. All these commentators also set out those portions of Yajnavalkya relating to the Niyoga practice, that of subsidiary sons other than the adopted son, and that of an appointed daughter's son and give their commentary, but that does not mean merely because the commentator for the sake of completeness of the work wrote an elaborate commentary on these portions of Yajnavalkya or the other Smritis that at the time when they were writing the commentaries, these practices were still in vogue. Even by the time of Manu, the Niyoga practice had become obsolete. He says so in fact and yet he mentions the practice of Niyoga and the rules relating to it. (Manu IX, 64, 66-68).

What is more important and more relevant to my mind is the fact that one at least of the commentators refuses even to

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discuss the rights of the issue of such marriages on the ground that it will be a sheer waste of time. That could only be on the footing that it is not necessary to devote any time to a discussion of the rights of these persons because these institutions are no longer in vogue and it is not necessary to prescribe for the state of society as it was when he was writing the commentary. That is why the discussion in Smriti Chandrika seems to be of very great importance in finding out whether really this system of *anuloma* marriages had not become obsolete by the time he was writing. There can be only one answer. It seems to me clear therefore that by the time of the Nibandha-karas which began by about the tenth century A.D., if not earlier, this practice of *anuloma* marriages had become obsolete.

Now coming to the text writers after the advent of the British rule, there are several treatises of various English and Indian writers of eminence. All these without an exception state that this practice of *anuloma* marriage has become obsolete. In the sixth, seventh, eighth and ninth editions of Mayne which alone are available to us this subject is dealt with in paragraph 89. The sixth edition is of the year 1900 and in all the editions it is pointed out that such marriages had become obsolete. In the tenth edition it is pointed out in paragraph 124 that the rules in ancient law books regarding marriages between persons of different castes have long ago become obsolete. Sir Thomas Strange in his Hindu Law published in 1825 discusses it at pages 39 and 40. He winds up by saying:

"But it is unnecessary to dwell upon these distinctions, the practice of such inter-marriages being considered to have been prohibited from the commencement of the present (the Kali) age; since when equality of tribe has been ever, as it continues to be in the strictest sense, essential to legal marriage, though not to the legitimacy of the issue; inasmuch as, should one so prohibited take place, the issue would notwithstanding be legitimate."

It is not now contended before us that if the marriage is invalid the issue can be legitimate. The above passage from Strange written in 1825 shows that he understood that it was unnecessary even to dwell upon those distinctions as the system of marriages of persons belonging to different castes was considered to have been prohibited from the commencement of the Kali age and that equality of tribe was in the strictest sense essential to a legal marriage. Sir Gurudoss Banerjee in his work on Marriage and Stridhanam and J.C. Ghosh all say that

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such marriages had become obsolete from the commencement of the Kali age. (Banerjee, 5th Edition 76-82. Ghosh's Hindu Law, Volume I, 809-810). Mandlik also is of the same opinion (See his edition of Vyavahara Mayukha, Part II, page 218, footnote). Dr. Jolly also takes the same view (Hindu Law—Tagore Law Lectures, 1883, pages 179-181).

Shamcharan Sircar who was one of the Tagore Law Lecturers, says in his Vyavastha Darpana the second edition of which was published in 1867, on page 656, Vyavastha, 399:

"The marriage with a girl of a different caste is prohibited in the present (Kali) age."

And he relies on passages from the Vrihat Naradiya Purana and Aditya Purana.

Again, in the Chapter treating of the castes of the Hindus, he says on page 1038, Vyavastha, 674:

"Each of the castes or classes above mentioned is at present a separate or distinct tribe. Inter-marriages, between any two of these castes or classes, being abrogated or not being in practice, it must be concluded that the marriage between any two of them, if contracted, is null and void, and the issue of such marriage not entitled to inheritance, the same being considered as unlawfully born."

The writer says the same thing in his Vyavastha Chandrika Volume II, page 454, para 693 (1880 edition).

Of these, Vyavastha Darpana relates to the law as current in Bengal and the Vyavastha Chandrika relates to the law as current in all the provinces of India; except Bengal proper. Thus, the institution of *anuloma* marriage is prohibited by the Nibandhakaras or commentators and also by the modern text writers as unsuited for this Kali age. As stated in Mayne's Hindu Law, tenth edition on page 178:

"When Hindu writers say that certain practices have become prohibited in the Kali age, they do not merely mean that the ancient practices are now prohibited and are therefore no longer law. The prohibition was due to a new consciousness and wide disapproval, to a new usage, discontinuing or abrogating the old usage."

Coming to the decisions, the question directly arose for decision before the Allahabad High Court in *Padam Kumari* v. *Suraj Kumari*[1]. There, the marriage was between a Brahmin male and Kshatriya female. There is no discussion in the judgment. Burkitt, J., says:

"Now whatever may have been the case in ancient times, as shown in old text books, I have no hesitation in saying that at the present day marriage

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1. (1906) I.L.R. 28 All. 458.

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between a Brahmin and a Chhattri is not a lawful marriage in these provinces and that the issue of such a marriage is not legitimate."

Aikman, J., says:

"Whatever may have been the case in ancient times, and whatever may be the law in other parts of India, I think there can be no doubt that in these Provinces there cannot in the present day be a lawful marriage between a Brahmin and a member of a different caste."

The question came up before the Bombay High Court in *Bai Kashi* v. *Jamnadas Mansukh Raichand*[1], a case of a *pratiloma* marriage, that is, a marriage of a woman of a higher caste with a man of a lower caste. Mr. Justice Chandavarkar, while pointing out that a *pratiloma* marriage was expressly prohibited even by the old Smriti writers, says that an *anuloma* marriage would in the present day be invalid. The learned Judge begins the discussion by referring to *anuloma* marriages. After referring to various portions of Manu and other text writers, he points out that Yajnavalkya's own opinion was against such marriages. Then, he refers to the comment of Vignaneswara that the text of Yajnavalkya was a prohibition of the marriage of a woman of the Sudra caste with a man of the twice-born class. He then refers to Nilakanta's Mayukha which is a leading authority in the Bombay Presidency. He says:

"From this gloss of the Mitakshara, from which Nilakanta, the author of the Vyavahara Mayukha, expresses nowhere any dissent, it is reasonable to infer that, according to the leading authorities on Hindu Law as recognised in this Presidency, a Shudra wife is not permitted to a Brahmin, a Kshatriya, or a Vaishya. If that is so, it is a necessary corollary from it that the marriage of a Brahmin woman with a Shudra is also prohibited. This inference is supported by a text cited by Madhavacharya in his commentary on the *Parashara Smriti*, which is regarded by Hindus as an authority of special force in these times called *Kaliyug*. In that commentary, after quoting the conflicting texts on the question of marriage between persons of different castes, Madhavacharya concludes as follows:

"Distinguishing the different ages, the law is clearly established by a Smriti, which, referring to the marriage of persons of any of the twice-born castes with persons of other castes declares: 'the learned say that these practices must not be followed in the age of Kali'."

Mr. Justice Chandavarkar, after pointing out that if in the case of *anuloma* marriages, the marriage is invalid, it is an *a fortiori* case in the case of a *pratiloma* marriage, then goes on to say that in the case of *pratiloma* marriage it is not a case of a mere inference and that there are several texts prohibiting *pratiloma* marriage. His view therefore is that an *anuloma*

1. (1912) 14 Bom.L.R. 547.

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marriage, is not valid, though the point did not directly arise before him for decision.

The validity of an *anuloma* marriage directly arose in *Bai Gulab* v. *Jiwanlal Harilal*[1]. Mr. Justice Shah delivering the leading judgment, held that such a marriage is valid; and Mr. Justice Venkatasubba Rao sitting as a single Judge followed this decision in *Ratansi D. Morarji* v. *The Administrator-General of Madras*[2]. In a later decision of the Bombay High Court in *Natha Nathuram* v. *Mehta Chotalal*[3], the decision in 46 Bombay was not challenged and the validity of an *anuloma* marriage was upheld. There is, however, a discussion by Mr. Justice Patkar and he follows in the main the reasoning of Mr. Justice Shah in the earlier case. It is therefore necessary to consider the reasoning in the 46 Bombay case. The question divides itself into two parts: (1) Has it become obsolete? and (2) if so, whether it could be revived?

Mr. Justice Shah refers to Manu and Yajnavalkya and points out, quite rightly in our opinion, that Manu recognises the existence of such marriages in his time and the validity thereof. After referring to Manu, Yajnavalkya and Vignaneswara he says at page 883:

> "Thus Yajnavalkya and Vignaneswara, whose opinions are binding upon us, do not lay down any *prohibition* as distinguished from disapproval of *anuloma* marriages."

Then, he takes up Nilakanta's opinion as expressed in his Mayukha and points out that Nilakanta practically accepts the view as propounded in the Mitakshara. He winds up the discussion of the texts on page 885 by saying:

> "It would thus appear that Manu and Yajnavalkya, Vignaneswara and Nilakanta are agreed that the *anuloma* marriages are not prohibited."

Then, after referring to Mr. Justice Chandavarkar's reading of Mayukha, he expresses his dissent from that view and says:

> "Thus the argument for the appellant derives no support from the two principal Smritis nor from the Mitakshara and the Samskara Mayukha. How is then the prohibition to be inferred contrary to these opinions? The only ground suggested is that such marriages are obsolete and must be taken to be prohibited by usage. I am unable to accept the view that because such marriages are obsolete they are illegal or prohibited by law. The prohibition must be found in the law books or in the usage having the force of law.

1. (1921) I.L.R. 46 Bom. 871.
2. (1928) 55 M.L.J. 478: I.L.R. 52 Mad. 160 at 173.
3. (1930) I.L.R. 55 Bom. 1.

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Such usage must be proved like any other fact. It may be that the fact of their being obsolete may render the proof of such usage easy .... The opinions of Manu and Yajnavalkya and Vignaneswara and Nilakanta, if I may say so, are fairly reflected in the general attitude of the castes in these matters. 'They approve of marriages within their respective circles, and generally speaking disapprove of marriages outside their circles. They do not, however, necessarily refuse to recognise the marriages outside their circles but extend the same toleration socially to those who depart from the usual rule as the Smriti writers and the commentators have extended legally to *anuloma* marriages .... But the attitude of the castes, which is stated in different modern books as prohibiting inter-caste marriages altogether, is generally indicative of nothing more than the disapproval of such marriages according to the rules of practice of each different caste. It does not afford a sufficient justification for treating as illegal what has not been prohibited but in terms contemplated and allowed by law."

Shah, J., does not, it is clear, refer to any other ancient text writer except Manu, Yajnavalkya, Vignaneswara and Nilakanta. There are a number of commentators who expressly prohibit these marriages and, as I pointed out, at least one of them goes so far as to refuse to waste any time on the discussion of the rights of the children of such marriages. Even the prohibition contained in Parasara Madhaviya, a work of great authority, being the work of a great scholar and statesman, which is fully set out by Chandavarkar, J., in *Bai Kashi* v. *Jamnadas Mansukh Raichand*[1], is not even referred to by Shah, J. The whole of his judgment is that there is no prohibition in the law books. He says that the prohibition must be found in the law books or in the usage having the force of law. Evidently, if his attention had been drawn to the fact that the prohibition is found in the law books, his view might have been otherwise. Having regard to what we have set out above, we think it is not correct to say that there is no prohibition in the law books. That this institution was obsolete is recognised by Shah, J., when he says at page 886:

"It seems to me that far too much weight is sought to be placed upon the circumstance that the *anuloma* marriages are more or less obsolete."

His entire reasoning is contained in this, that in his opinion in addition to being obsolete, there must be a prohibition contained in the law books or in a usage having the force of law. Such a prohibition is contained in the commentaries above referred to even if such a prohibition is necessary.

1. (1912) 14 Bom.L.R. 547.

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As observed already, it is conceded that Manu, at any rate, while disapproving of such marriages, recognised the enistence of these marriages and made rules for the performance of the marriages and the like. Yajnavalkya in unmistakeable terms says that his own opinion is against the validity of such a marriage. Then, no doubt, he gives what, according to him, was the share of the son of a Sudra wife; but, that, personally he prohibits them, can admit of no doubt. Mitakshara simply comments on the various portions of Yajnavalkya and it has not given any independent opinion of its own. And Mayukha as shown already is against the validity of such marriages on the ground of its being obsolete. The passages from Nilakanta set out above were evidently not brought to the notice of Chandavarkar, J., and Shah, J. Therefore, Chandavarkar, J., is, we think, though not on the ground mentioned by him, quite justified in saying that Nilakanta's opinion is also against the validity of such a marriage.

Coming to the judgment of Mr. Justice Venkatasubba Rao in *Ratansi D. Morarji* v. *Administrator-General of Madras*[1] we must point out that after referring to *Bai Gulab* v. *Jiwanlal Harilal*[2], he says that even Chandavarkar, J., in *Bai Kashi* v. *Jamnadas Mansuk Raichand*[3], took the view that *anuloma* marriages are valid. This, we point out with great respect, is erroneous. Venkatasubba Rao, J., says at page 173:

> " Chandavarkar, J., in *Bai Kashi* v. *Jamnadas*[3], after an examination of the Smritis and the commentaries, also arrives at the conclusion that *anuloma* marriages are valid."

Then, he says that he was prepared to follow the decision in 46 Bombay and 14 Bombay Law Reporter and to decide that an *anuloma* marriage was valid. There is no independent discussion of his own. His judgment is therefore vitiated by his misunderstanding of what Chandavarkar, J., decided in 14 Bombay Law Reporter.

Then coming to the decision in *Natha Nathuram* v. *Mehta Chotalal*[4], Shingne, J., points out at page 17:

> " The correctness of the decision in *Bai Gulab's case*[2], was not challenged on behalf of the plaintiff."

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1. (1928) 55 M.L.J. 478: I.L.R. 52 Mad. 160.
2. (1921) I.L.R. 46 Bom. 871.
3. (1912) 14 Bom L.R. 547.
4. (1930) I.L.R. 55 Bom. 1.

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Therefore, Shingne, J., did not think it necessary to go into the various texts of Hindu Law on the point and stated that his learned brother had considered them. Patkar, J., who delivered the leading judgment does not add materially to the discussion of Shah, J., in *Bai Gulab* v. *Jiwanlal Hiralal*[1]. Like Shah, J., he refers to Manu and Yajnavalkya. Then, his attention was drawn to the opinion expressed in Mayne's Hindu Law, 9th Edition, pages 108 and 785:

> " That marriages between persons of different castes are obsolete, and a son born of such marriage would be illegitimate."

Dealing with it he says at page 9:

> " Shah, J., in *Bai Gulab's case*[1], was unable to accept the view that because such marriages are obsolete, they are illegal or prohibited by law, and held that the prohibition must be found in the law books, or in the usage having the force of law, and such usage must be proved like any other fact."

Then, he wound up this part of the judgment by referring to Shah, J.'s opinion, that the attitude of the castes which is stated in different modern books as prohibiting inter-caste marriages altogether, is generally indicative of nothing more than the disapproval of such marriages according to the rules of practice of different castes and that it does not afford a sufficient justification for treating as illegal what was not prohibited but in terms contemplated and allowed by law. We have sufficiently dealt with the opinion of Shah, J. It therefore appears that the view of Shah, J., is vitiated by his omission to refer to those commentators who expressly prohibit these marriages and who even refuse to discuss the rights of the issue of such marriages and also by what we consider is an erroneous view of the law when he says that when an institution is shown to be obsolete, the party must also go further and show that there is an express prohibition against such an institution in some law books or that it was prohibited by usage having the force of law. It may be difficult to arrive at the conclusion that a particular institution like an *anuloma* marriage or the practice of Niyoga or that of an appointed daughter's son is obsolete. But once you come to the conclusion that they are obsolete, it is difficult to postulate a further condition that the act questioned should, in addition to being proved to be obsolete, also be shown to have been expressly prohibited in the

1. (1921) I.L.R. 46 Bom. 871.

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law books or that it is contrary to a usage having the force of law.

In systems of jurisprudence where there is a law-making body such as a Parliament, there is no such thing as a law becoming obsolete. However long it may be before it is put into force or enforced, once a law is enacted, it is always a law and it continues to be the law until it is repealed by a later statute. But so far as Hindu law is concerned, it was never the subject of any legislative enactment. It is the growth of several ages and the Smriti writers and the commentators prescribe what, according to the needs of the society as it existed in their times, was necessary for regulating the relations between the various members of that society. As is clear from the various differences between the Dayabagha and the Mitakshara school, the Hindu Law did not stand still but was moulded to the needs of the particular age and was developed from time to time. As pointed but by the Judicial Committee in the 40 Bombay case already referred to, Hindu law did not stand still. The further growth of the Hindu law was arrested by the advent of the British rule and now further changes have to be made by the Legislature. In fact, the Legislature has enacted Act III of 1872and amended it in 1923 to suit the requirements of the changed conditions. If further changes are felt necessary, we can only look to the Legislature.

In addition to the commentators to whose opinions I have just referred, we have the writings of certain travellers who visited India some centuries back. They have noted what they observed to be the customs and practices of the country. We shall refer to them only for the purpose of showing that during the time when they visited India the system of *anuloma* marriage was not in vogue or rather that marriages within the caste were very strictly observed. Reference to these writings is necessitated by a vehement argument put forward on behalf of the respondents that the practice of *anuloma* marriage has not in fact become obsolete. It is urged by Mr. Rajamannar that marriages between the members of different castes are unusual and would occur only once in a way. He also says that all the cases which occur do not come to Court and that from the mere fact that we have not very many instances where the question has been dealt with by Courts of law, it ought not to be taken that the institution itself became

obsolete. He says that there is no evidence in this case to show that it was obsolete. It is with a view to meet this argument that we think it necessary to refer to the writings of some of these travellers.

Yuan Chwang came from China and visited India in the early part of the 7th century (629-645 A. D.). A work of his travels has been edited by Mr. J. W. Rhys Davids and Dr. Bushell and published by the Royal Asiatic Society. On page 168 of this book the following account is given:

"These four castes form classes of various degrees of ceremonial purity. The members of a caste marry within the caste, the great and the obscure keeping apart."

The Editor referring to the original wording in Chinese says:

"What our author states seems to be clear and simple. Marriages take place within a caste and a Vaisya man, for example, may marry any Vaisya maid. And he will marry no other . . . . But though a man might espouse any maid of his caste, the rich and the great married among themselves, and the poor and the obscure kept to themselves in their marriages." ("On Yuan Chwang's Travels in India 629-645, A. D." by Thomas Watters, 1904, Edition, pages 168-169.)

Then we have a chronicle of what Alberuni, a traveller from Persia observed during his visit between 997 and 1030 A.D. Dr. Edward C. Sachau has published an English translation of this traveller's book. Of Alberuni, Romesh Chundar Dutt in his work on "A History of Civilization in Ancient India", Volume II, page 318 says:

"But it is always a gain to see ourselves as others see us, and we propose in the present chapter to draw a similar sketch of Hindu civilization at the commencement of the Modern age, from materials supplied to us by a cultured and large-hearted foreigner, Alberuni, who wrote in the eleventh century."

In Dr. Sachau's edition of Alberuni, we find in Chapter LXIX the following passage in Volume II, page 156:

"In our time, however, the Brahmans, although it is allowed to them, never marry any woman except one of their own caste."

R. C. Dutt referring to this passage of Alberuni says on page 323:

"Every man of a particular caste could, under the ancient law, marry a woman of his own caste, or one of the castes below his. But this practice had fallen into disuse; caste had become more rigid, and in our time, however, the Brahmans, although it is allowed to them, never marry any woman except one of their own caste". (Chapter LXIX).

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Sir Thomas Roe in his Journal "Voyage into the East Indies", says:

> "This people marry into, and consequently still keep in their own tribes, sects, occupations and professions; for instance, all Brahmins (which are their priests, the sons of all which are priests, likewise) are married to Brahmins' daughters." (The Travels of Sig. Pietro, printed in 1665 (Madras University Library), page 434).

Francois Bernier in his "Travels in the Moghul Empire," translated and published by Archibald Constable and re-edited by Vincent Smith says on page 325:

> "These books enjoin that the people shall be divided, as in fact they are most effectually, into four tribes, (Tribus); first, the tribe of *Brahmans*, or interpreters of the law; secondly, the tribe of *Quetterys* or warriors; thirdly the tribe of *Bescue*, or merchants and tradesmen, commonly called Banyanes; and fourthly, the tribe of *Seydra* or artisans and labourers. These different tribes are not permitted to intermarry, that is to say, a *Brahman* is forbidden to marry a *Quettery* and the same injunction holds good in regard to the other tribes."

That is what Bernier observed in his travels between 1656-1668 A. D.

Steele in his 'Law and Custom of Hindoo castes within the Dekhun Provinces subject to the Presidency of Bombay', dealing with marriages in Chapter III which is headed "Existing Customs—Marriage", says, "the parties must be of the same caste". (Page 163 of the edition of 1868). Steele published his first edition in 1826. I hold therefore that an *anuloma* marriage is invalid.

I agree that the question of maintenance on the footing that there was no marriage between the first plaintiff and Janakiramamoorthy cannot be gone into in this suit and that the appeal should be allowed with costs in this Court.

K. S. *Appeal allowed.*

PRIVY COUNCIL.

(On appeal from the High Court of Judicature at Fort William in Bengal).

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Maharaja Sris Chandra Nandy *v.* Rakhala-nanda Thakur.

PRESENT:—LORD ATKIN, LORD THANKERTON AND SIR GEORGE RANKIN.

Maharaja Sris Chandra Nandy and others .. *Appellants** (*Defendants*)

v.

Rakhalananda Thakur and others .. *Respondents* (*Plaintiffs*).

*P.C. Appeal No. 13 of 1939.
Bengal Appeal No. 1 of 1938.

11th November, 1940.

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Evidence Act (I of 1872), Ss. 2 (1) and 32—Question whether X established certain deities and granted britti charging it on his estate—Evidence of tradition in the family—Not admissible as it is hearsay evidence—Not to be admitted as likely to throw light on an issue.

Where the question is whether a person had established certain deities, had granted some *britti* in perpetuity and had made it a charge upon his estate, evidence of tradition in the family concerning the same will be hearsay evidence not admissible under S. 32 of the Evidence Act.

The provisions of the Evidence Act purports to contain the whole law on evidence and are imperative. It is not open to any Judge to exercise a dispensing power, and admit evidence not admissible by the statute because to him it appears that the irregular evidence would throw light upon some issue.

Maharaja Srish Chandra Nandi v. *Rakhalananda Thakur*, (1937) 41 C.W.N. 1103: 65 C.L.J. 520, reversed.

Appeal from a decision dated 19th May, 1937, of the High Court of Judicature at Fort William, Bengal (Guha and Mitter, JJ.,) affirming a decree of the Additional District Judge, 24 Parganas in favour of the plaintiffs, the present respondents.

The facts appear fully from their Lordships' judgment.

J. Millard Tucker and *W. Wallach* for Appellants.

Sir Thomas Strangman and *C. Bagram* for Respondents.

11th November, 1937. Their Lordships' judgment was delivered by

Lord Atkin.

Lord Atkin.—This is an appeal from the High Court of Judicature at Fort William in Bengal who affirmed a decree of the Additional District Judge, 24 Parganas, in favour of the plaintiffs, the present respondents. The plaintiffs are a distinguished family of Brahmin priests, Thakurs of Srikhanda: and their claim is for a declaration that they are entitled to a charge on the Kasimbazar Raj Estate represented by the defendants for an annual britti of Rs. 4,000 payable by half-yearly instalments and for a money decree for arrears amounting to Rs. 13,260. The defences to the suit are in substance that the plaintiffs never had a legal right to the britti, and that in any event it was not charged upon the estate. These issues were raised in the proceedings and have been decided in favour of the plaintiffs in both Courts. The history of the claim begins with the founder of the Raj fortunes, one Krishna Kanta Nandy. He appears to have been a Hindu of comparatively humble origin who by his abilities attracted the attention of Warren Hastings, became his Diwan, and died in the year 1778, proprietor of large possessions in about twelve different districts and in Calcutta. After his death, his son Loknath appears to have been given

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the title of Maharajah of Kasimbazar by Warren Hastings, and the property to which he and his descendants have succeeded is known as the Kasimbazar Raj Estate. The case of the plaintiffs is that Krishna Kanta Nandy established two deities Radhagovinda and Lakshminarayan at Shrikhanda, the plaintiffs' home, and granted the plaintiffs a britti of Rs. 4,000 for the worship of the two deities; and at the same time charged his Raj estate with the payment of the britti. The plaintiffs and their successors, it is said, became the gurus of Krishna Kanta Nandy and his family and its successors: they have conducted the worship and service of the deities ever since.

The learned Assistant District Judge found that the plaintiffs had established the whole of their case. A permanent grant of britti was made by Krishna Kanta Nandy who had established at the home of the plaintiffs the two deities and provided the britti for securing their service and worship. To secure the permanent payment he had charged it upon the estate. The learned High Court Judges were not able to find that Krishna Kanta Nandy had established the deities, but they concurred in the finding that he had made a permanent grant, and had charged it upon the Kasimbazar estate. Their Lordships are of opinion that no evidence was given sufficient to support these findings. As they will point out later, both Courts erred in admitting as valid evidence of tradition given by and on behalf of the plaintiffs: and when the admissible evidence is considered there is none to justify the finding of a permanent grant or of a charge. The evidence establishes the following facts: that from the time of Krishna Kanta Nandy the sum of Rs. 4,000 has been paid annually to the plaintiffs and their successors as britti: that they have continuously conducted the worship and service of the two deities: and that until about the year 1897 such worship was conducted on behalf of the holder of the Raj and that the plaintiffs were the gurus of his family. The succession of the Raj family is relevant. Krishna died in 1778 and was succeeded by his son Loknath who first received the title of Maharajah. There is nothing to indicate that this is an impartible estate. Indeed, what little evidence there is on the point indicates the contrary, but in fact there only appears to have been one person at a time entitled in the line of descent. Loknath was succeeded by Harinath who died in 1832, who was succeeded in turn by his son Krishnanath, who died in

1844 without issue. His widow Rani Swarnamayi succeeded to the estate and possessed it for over 50 years until her death in 1897.

On her death the estate reverted to Krishnanath's mother Rani Hari Sundari. She, who must have been a very old lady at the time, in the same year, transferred her interest to the next successor Manindra Chandra Nandy, the son of her daughter Gobinda. The estate thus passed out of the direct male succession. Manindra had for his gurus another family the Thakurs of Jogeswardi, and had family deities other than, Radhagovinda and Lakshminarayan. In 1923 Manindra Chandra Nandi executed a trust deed in favour of the firm of Ogilvy Gillanders & Co., and certain named trustees with the object that the firm should raise a loan for the Maharajah of £675,000 and pay off certain scheduled incumbrances and unsecured liabilities. The bulk of the Raj estate was assigned to the trustees by way of mortgage or trust to keep down the necessary charges, and create certain reserve funds including a sum of three lacs which the Maharajah estimated would be sufficient for his personal household expenses. The Maharajah covenanted *inter alia* that the property was free from all incumbrances other than those mentioned in Sch. 4 to the deed which did not include the charge now alleged to exist. In February, 1929, on the application of the Maharajah Manindra the estate was taken under the management of the Court of Wards by whom it is now managed subject to the provisions of the deed of trust of 1923. In 1929 the Maharajah Manindra died and was succeeded by the present Maharajah Sris Chandra Nandy On 10th April, 1929, the plaintiffs presented a petition to the General Manager of the Kasimbazar Raj Ward's Estate alleging that they had been receiving for generations from the estate an annual annuity allowance of Rs. 4,000, that they had been spending the said allowance as well as their own income towards the worship of several deities and other acts of piety: and asking for the payment of one year's arrears. It may be noticed that in this letter there is no suggestion of the establishment by Krishna Kanta Nandy of the two specified deities, or of a permanent grant by him, or of the creation of any charge. This request was refused by the Manager of the Court of Wards and on 28th June, 1929, the Maharajah Manindra wrote to him having been told by the plaintiffs of the refusal.

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Kasimbazar Rajbari,
The 28th June, 1929.

My dear Mr. Burrows,

I have read your letter No. 575ES/16-108 dated the 4th May, 1929, (a copy of which was forwarded to me) as also another letter No. 1565ES dated the 15th June, 1929, (shown to me) sent in reply to the letters of Srijut Rakhalananda Thakur of Shrikhanda.

The annual Britti payable to our spiritual guides, the Thakurs of Shrikhanda amounting to Rs. 4,000 (Four thousand) has been paid by the Raj family of Kasimbazar from generation to generation, and I have been paying it all along during my management.

During Mr. Lyall's administration as he did not like to meddle with Religious and Spiritual matters, he left the matter with me of course leaving sufficient fund in my hands.

It is not of the nature of personal charity but has always been regarded as a charge upon the estate. I have nothing to say regarding your decision. You may hold it or alter it if there be good reason for doing so, but this Britti in my opinion, is legally enforceable against the Kasimbazar Raj Estate.

In this connexion I would like to refer you to my letter No. 1/XII-4/3-G dated the 19th April, 1929, in which I mentioned the recurring permanent grants which in addition to other commitments I am bound to make namely, 1. To spiritual guides of Shrikhanda and Jageswardihi, 2. Debkarjya and Debsheba &c. and to my letter to the Secretary, Board of Revenue dated the 2nd February, 1929, with statements therewith attached, a careful perusal of which will clearly convince you that the above demand is a charge really upon Kasimbazar Raj Estate and incidentally upon me as proprietor of the Estate and not in my personal capacity.

The following is an extract of the relevant portion of my letter to Mr. Fawcus, Secretary, Board of Revenue dated the 2nd February, 1929, for your easy reference.

"I should like to state however in this connexion that whereas I have these additional sources of income which are not covered by the trust deed I have at the same time additional demands on me for Debkarjya and Britti for spiritual guides and Brahmain Pundits and the maintenance of educational institutions which have been recognised by the family from generations past."

I shall be glad if you will consider all the facts relating to this matter and recommend to the Court for acceptance of the charge of paying Rs. 4,000 annually to the Thakurs of Shrikhanda which is in reality a charge on the Kasimbazar Raj Estate.

Yours sincerely,
Manindra Chandra Nandy.

L. B. Burrows, Esqr., B.A.,
Manager, Kasimbazar Raj Wards' Estate,
2-1, Russell Street, Calcutta.

So far from regarding this letter as proof of a legal charge, their Lordships are of opinion that it tends to negative such a claim. The Maharajah is obviously seeking to limit his

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personal liabilities: and is treating the continual payment of this britti as an instance of the

> "additional demands on me for Debkarjya and britti for spiritual guides and Brahmin Pundits and the maintenance of educational institutions which have been recognised by the family from generations past."

It seems obvious that the continuous recognition is to him another way of saying it has always been regarded as a charge upon the estate. It would not be suggested that the other "additional demands" in which this claim is included involved legal charges upon the property. It seems obvious the letter of the Maharajah, written in the circumstances set out in the letter, could not possibly outweigh the express covenant in the deed of 1923 that there were no incumbrances other than those scheduled. In the result therefore there is no evidence at all of the establishment of the deities by Krishna, of any permanent grant by him of the britti, or of the creation of any charge upon any property. It is very significant that though the plaintiffs appear to have very complete records of their transactions from early times no document is produced making or evidencing the grant or charge: and this alone is sufficient to cast doubt upon the claim.

Moreover, while it would not be unusual to assign particular lands as the source from which britti was to be paid and in this sense create a charge, it would seem to their Lordships very improbable that a vast estate should be charged as a whole with the payment of Rs. 4,000 a year. Their Lordships are not prepared to say that a valid charge could not be created upon what could be defined to be the whole of a man's property, at the date of the charge. In the present case it should be noticed that not only is the charge claimed and decreed a charge upon the estate as it at present exists; but it has been decreed without any condition that the families of the grantor or the plaintiffs should continue to exist, or that the plaintiffs should continue to perform the service and worship, sheva and puja, of the two named deities. This defect in the decree was admitted by counsel for the respondents who submitted an amended form of decree which would remedy the mistake. But for present purposes the point is the difficulty the plaintiffs are in, in establishing any grant or charge with any sufficient certainty. Naturally, if the continuous payments could not be explained without asserting some legal origin which would create the

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rights claimed, any Court would feel inclined to presume the necessary legal origin.

But, in the present case, there are no facts which require a presumption of any lost grant either for the permanent gift of the britti or still less for it being constituted a charge. It appears to their Lordships the natural inference from the known facts that the original founder of the estate granted the britti in his lifetime: and that his successors from pious motives continued the grant to the plaintiffs' successors who continued to be the family spiritual guides, and served and worshipped the family gods. Without assuming any legal obligation it would in the circumstances have been strange if the britti had not been continued. The learned trial Judge working backwards, as it would seem from the fact that the payment was continued for several generations, has imputed to the founder the intention that it should continue for all those generations; and has so drawn the inference that he did in fact grant a permanent britti; and took steps to secure its permanence by creating a charge, the uncertainty of the terms of which their Lordships have already discussed.

The trial Judge, it is true, found that Krishna Kanta Nandy established the deities. The High Court have found that it would not be safe on the evidence to hold that the plaintiffs had established the case that the two deities were so established. Nevertheless they go on to say that they cannot express the definite opinion that the trial Judge was not right in his inference that the deities were so established. This conclusion appears to involve some confusion of thought. If it was not safe from the evidence for the appellate Court to draw a particular inference it was not safe for the trial Judge to draw the inference. Not safe, must mean that there is not evidence from which the inference can reasonably be drawn. There are cases in which evidence is so well balanced that an inference either way can reasonably be drawn. In such cases the appellate tribunal may select the inference they choose: but they can have no equal choice between an inference that is safe, and one that is unsafe.

But the conclusions of the two Indian Courts are not based solely on the evidence of which the substance has been stated above and which their Lordships have held to be insufficient. Both Courts relied on the evidence of some of the plain-

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tiffs' witnesses speaking of a tradition in their family, that Krishna Kanta Nandy had established the two deities, had granted the britti in perpetuity and had made it a charge upon the estate. Obviously this is hearsay evidence, and it is equally clear that it is not one of the classes of hearsay evidence admissible under the provisions of S. 32, Evidence Act.

The members of the High Court recognized this but they made a statement as to the law of evidence which their Lordships feel bound to state is entirely erroneous. They say:

"It is to be noticed in this connexion that S. 2 (1), Evidence Act, repeals the whole of the English common law on evidence so far as it was in force in British India before the passing of the Evidence Act, and that provision of the law in effect prohibits the employment of any kind of evidence not specifically authorized by the Act itself."

This is of course correct. But they continue:

"It must be recognised however, that the principle of exclusion adopted by the Evidence Act should not be applied so as to exclude matters which may be essential for the ascertainment of truth."

It seems to their Lordships essential in the interests of the administration of justice in India that this mode of regarding the law of evidence should emphatically be stated to be unsound. What matters should be given in evidence as essential for the ascertainment of truth it is the purpose of the law of evidence whether at common law or by statute to define. Once a statute is passed which purports to contain the whole law it is imperative. It is not open to any Judge to exercise a dispensing power, and admit evidence not admissible by the statute because to him it appears that the irregular evidence would throw light upon the issue. The rules of evidence, whether contained in a statute or not, are the result of long experience choosing no doubt to confine evidence to particular forms, and therefore eliminating others which it is conceivable might assist in arriving at truth. But that which has been eliminated has been considered to be of such doubtful value as on the whole to be more likely to disguise truth than discover it. It is therefore discarded for all purposes and in all circumstances. To allow a Judge to introduce it at his own discretion would be to destroy the whole object of the general rule. There is therefore no such principle as is suggested in the passage now under discussion.

At the same time their Lordships wish to make it clear that apart from any rule of law the evidence in question so far from leading to the ascertainment of truth in fact for the

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reasons already given leads away from it. It is not remarkable that the learned Judges who gave leave to appeal in this case did not conceal some uncertainty as to the correctness of this part of the judgment. Their Lordships do not think it necessary to discuss at any length inferences drawn by both Courts from the absence of evidence by the defendants of the contents of their own books. They do not think that in the circumstances the comments are well founded. In the result therefore their Lordships are of opinion that this suit fails, and that the appeal should be allowed and the suit dismissed. Their Lordships will humbly advise His Majesty accordingly. They notice however that the late Maharajah Manindra clearly regarded the payment of the britti as being a personal obligation of his, and it would seem to follow in their opinion that the Court of Wards would be justified in making payment of the arrears up to the time of his death to the plaintiffs. This is not however a matter for decree in this suit. The respondents must pay the costs in the Indian Courts and of this appeal.

Solicitors for Appellants: *Solicitor, India Office.*

Solicitors for Respondents: *W. W. Box & Co.*

K. S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, AND MR. JUSTICE KRISHNASWAMI AIYANGAR.

P. Venkatasubbiah Chetty and others. *Appellants** (*Respondents 1 to 4—Defendants 1 to 4.*)

v.

The Jumma Mosque, Cutchery Road, Mylapore, Madras by its Muttavalli C. Khadar Mohideen Sahib and H. Abdul Aziz Sahib and another. *Respondents* (*Appellant and 5th Respondent—Plaintiffs and 5th Dedant.*)

Venkatasubbiah Chetty v. Jumma Mosque. Mylapore.

Evidence Act (I of 1872), S. 32 (3)—Statement by a dead person—His pecuniary interest affected—Admissible after his death—Mortgage deed of the year 1873—Condition that property should belong to mortgagee if not redeemed within a certain period mentioned—Whether enforceable.

Sub-cl. (3) of S. 32 of the Evidence Act read with the opening words of the section is to the effect that a statement made by a person who is dead is

* L.P.A. No. 33 of 1939. 20th November, 1940.

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admissible in evidence when the statement is against his pecuniary or proprietory interest.

Where the mortgagor, who was the superintendent of a mosque, mortgaged certain properties holding himself out to be their owner, and subsequently in 1874 a suit was brought for removing him from office on the ground of improper alienation by him of the properties of the institution, and a compromise decree was passed declaring that certain properties belonged to the mosque—the decree being in effect a statement by the mortgagor against his proprietary interest, that the mosque was the owner of the properties—such decree, though it cannot affect the mortgagee, will be admissible in evidence in a suit brought after the death of the mortgagor by the trustees of the mosque for the redemption of the mortgage, to prove that the mosque had the equity of redemption in the suit properties, which admittedly were within the area of the properties covered by the compromise decree.

A mortgage of the year 1873 should be taken to be governed by the law relating to mortgages in Madras then prevailing and a condition in the deed conferring a right on the mortgagees that the property should become theirs unless redeemed within two years, could not be enforced.

Appeal under Cl. 15 of the Letters Patent against the judgment of the Hon'ble Mr. Justice Patanjali Sastri dated 4th April, 1939, and passed in C.C.C. A. No. 50 of 1937 preferred against the decree of the Court of the City Civil Judge (Additional) Madras in O.S. No. 688 of 1935.

K. Bhashyam Aiyangar, M. S. Venkatarama Aiyar and *V. Ganapathi Aiyah* for Appellant.

K. V. Krishnaswami Aiyar, T. E. Ramabhadrachariar and *A. Rajabahadur Mudaliar* for Respondents.

The judgment of the Court was delivered by

Leach, C.J.

The Chief Justice.—This is an appeal under Cl. 15 of the Letters Patent. The suit out of which it arises was filed in the City Civil Court by the trustees of the Jumma Masjid in Cutchery Road, Mylapore, Madras for the redemption of four mortgages. The mortgaged properties consisted of two blocks. The first block was mortgaged by a deed executed on the 14th February, 1873. A part of the second block was mortgaged on the 9th February, 1850, another part on the 28th January, 1860, and the remainder of the block on the 19th December, 1864. The City Civil Court Judge held that the trustees had not proved that the properties belonged to the mosque. He also held that the suit was barred by the law of limitation in so far as it concerned the mortgage of the properties in the first block. The result was that the suit was dismissed with costs. The trustees appealed to this Court and their appeal was heard by Patanjali Sastri, J., who disagreed with the trial Court on the

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question of ownership and held that the trustees were entitled to redeem the properties comprised in the second block. With regard to the mortgage of the first block the learned Judge agreed with the trial Court that the law of limitation barred the trustees' claim. The first, second, third and fourth defendants, who are the successors in interest of the mortgagee of the properties comprised in the second block, have appealed against the finding of the learned Judge that the trustees are entitled to redeem. The trustees have filed cross-objections, challenging the decision of the learned Judge that the law of limitation has destroyed their right to redeem the mortgage of the first block.

All the mortgages were created by one Ghulam Hyder, who was the superintendent of the mosque at that time. In mortgaging the properties he held himself out to be the owner. In 1874 a suit was filed in this Court by one Hafiz Sadrool Islaam Khan on behalf of himself and other members of the Muhammadan community of Mylapore against Ghulam Hyder for a decree removing him from the office of superintendent. It was alleged that he had wrongfully alienated properties belonging to the trust. This suit was compromised and the decree which was passed in accordance with the terms of the compromise declared that certain properties belonged to the mosque. The area of these properties was defined and it is admitted that within the area fall the properties now in suit. Another suit was filed in this Court in the year 1892, which also ended in a compromise and a further declaration that the properties with which the suit is concerned belonged to the mosque, but Ghulam Hyder was not a party to the second suit. His son was a party, but the suit as against him was withdrawn.

The question which the Court is called upon to decide with regard to the properties in the second block is whether there is evidence that the properties belong to the mosque, that is evidence which is admissible in a Court of law and sufficient for proof. Before the respondents can be allowed to redeem the mortgages they must, of course, show title. Owing to the lapse of time the respondents are not in a position to trace the history of the properties and they are driven to relying on the compromise and the decree which followed it in the suit filed in 1874. Patanjali Sastri, J., held that the decree passed in that suit was in itself sufficient for the respondents' purpose. He

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relied on the decision of this Court in *The Secretary of State for India in Council* v. *Syed Ahmad Badsha*[1]. The appellants contend that the decree is not sufficient for the purpose of proving the respondents' title. They maintain that no admission made by the mortgagor after the mortgages had been created can bind them.

We are unable to agree with the learned Judge that *The Secretary of State for India in Council* v. *Syed Ahmad Badsha*[1], has application here. In that case a Full Bench of this Court held that a judgment in a suit which does not operate as *res judicata* can be used as a piece of evidence on the question of title. The suit was concerned with a claim to an office in a Muhammadan institution, and the question was in no way analogous to the question now under discussion.

It is well settled that a statement or an admission made by a person cannot affect a title previously created by him. To use the words of Lord Denman, C. J., in *Doe* v. *Webber*[2], a person who has parted with his interest in property cannot divest the right of another claiming under him by any statement which he may choose to make. This principle has been accepted in India and there is nothing in the Indian Evidence Act which throws any doubt on the power of the Court to apply it. Basing his argument on this principle Mr. Bashyam Aiyangar, on behalf of the appellants, has contended that Ghulam Hyder's admission that the properties in suit belonged to the mosque must be ignored entirely. It would have to be ignored if the compromise decree in the suit of 1874 adversely affected the position of his clients, but that is not the case and the principle therefore does not apply.

There has been a great deal of discussion on the question whether the decree in the suit of 1874 amounts to an admission within the meaning of S. 18 or S. 19 of the Evidence Act, but it is unnecessary to decide whether either of these sections has any application. It may be taken for the purposes of this case that neither section applies, but this does not mean that the decree in the suit of 1874 cannot be admitted in evidence. We are of the opinion that the decree can be admitted in evidence under S. 32. Once it is admitted it is admitted for all purposes and we consider

1. (1921) 41 M.L.J. 223: I.L.R. 44 Mad. 778 (F.B.).
2. (1834) 1 Ad. & E. 733: 110 E.R. 1387.

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that it establishes the title of the mosque to the properties in suit. Sub-cl. (3) of S. 32 read with the opening words of the section is to the effect that a statement made by a person who is dead is admissible in evidence when the statement is against his pecuniary or proprietary interest. Ghulam Hyder is dead and the decree is in effect a statement by him that these properties belong to the mosque, a statement which was against his proprietary interest. His statement cannot, however, affect the interests of the mortgagee or of the mortgagee's successors in interest, and therefore so far as they were concerned the decree must be taken to be merely an admission by Ghulam Hyder that the mosque was entitled to the equity of redemption in the property. But this is sufficient to entitle the respondents to succeed, as Ghulam Hyder knew the true position and there is no evidence in contradiction. This finding disposes of the appellants' case.

Turning now to the cross-objections the position is this. The mortgage of the 14th February, 1873, provided that unless it was redeemed within a period of two years the property should become the absolute property of the mortgagees, Meera Sahib and Ali Ibrahim. The mortgagor failed to redeem. Meera Sahib died before the 2nd February, 1880. On that date the son of Meera Sahib, who represented his deceased father, and Ali Ibrahim sold the property to one Nagayya Chetti. As the property had not been redeemed within the period allowed by the deed for redemption the vendors regarded themselves as the absolute owners. The appellants now stand in the shoes of Nagayya Chetti. The question is whether the deed of the 2nd February, 1880, amounts to a transfer of the property within the purview of Art. 134 of the Limitation Act. If it does amount to a sale of the whole interest in the property, not merely a transfer of the mortgagees' interest, admittedly the article has application, and this is what Patanjali Sastri, J., has found.

In 1875 in *Thumbusawmy Moodelly* v. *Hossain Rowthen*[1], the Privy Council held that a contract of mortgage by conditional sale could be enforced according to the letter under the law of India as it then stood and that the Madras and Bombay Courts in applying English rules had erred. This meant that the English maxim, once a mortgage always a mortgage, had

1. (1875) L.R. 2 I.A. 241: I.L.R. 1 Mad. 1 (P.C.).

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no application in India. From the year 1858 the Courts in the Madras Presidency and from the year 1864 the Courts in the Bombay Presidency had applied the English law relating to mortgages, and the Privy Council recognized that what had been done could not be undone. It did not, however, definitely decide what course should be adopted in future and in *Ramasami Sastrigal* v. *Samiappanaykan*[1], this Court decided that the English rules of law with regard to mortgages should continue to apply to mortgages by conditional sale. Therefore it must be taken that when the mortgage of the 14th February, 1873, was executed the law in Madras regarded the deed as merely conferring a mortgagee's rights on Meera Sahib and Ali Ibrahim, and the condition that the property should become theirs unless the mortgage was redeemed within two years could not be enforced. That was also the position when the document of the 2nd February, 1880, was executed.

The question whether the son of Meera Sahib and Ali Ibrahim in fact conveyed a full title to Nagayya Chetti is not material. It has rightly been conceded by Mr. K. V. Krishnaswami Aiyar that even if the vendors were not in possession of a full title but purported to convey an absolute title to Nagayya Chetti the transaction would constitute a transfer within the meaning of Art. 134. We have examined the document with care and we agree that the learned Judge has rightly construed it as an instrument of sale and not as an assignment of the mortgagees' interest. This being the case the cross-objections also fail and must be dismissed.

The appellants will pay the costs of the appeal to the trustees of the mosque, and the trustees of the mosque will pay to the appellants out of the mosque funds the costs of the cross-objections.

K. C. *Appeal and memorandum of cross-objections dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

B. Nagaraja Rao and others .. *Petitioners** (*Plaintiffs—Appellants*)

v.

Koothappan—son of Tippurahalli Goundan and others. *Respondents* (*Defendants—Respondents*).

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1. (1881) I.L.R. 4 Mad. 179 (F.B.).

* C. R. P. No. 1280 of 1939. 20th December, 1940.

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Registration Act (XVI of 1908), S. 17 (1)—General Clauses Act (X of 1897), S. 6—Early document—Requirements to be satisfied for admissibility in Court—Validity of—Pattas of 1867—Nature of tenure—Admissibility of pattas—Accounts—Handwriting unidentified—Signature unknown—Under S. 90, Evidence Act (I of 1872) whether provable—Civil or Revenue Court the forum for the filing of a suit by persons having the ryoti interest in land.

There is great weight of authority in support of the view that S. 17 (1) of the Registration Act, when read along with S. 6 of the Indian General Clauses Act, does not destroy the validity or the admissibility in evidence of a document which complied with all the necessary formalities as they existed at the time of its execution.

Desai Motilal Mangalji v. *Desai Parashotam Nandlal*, (1893) I.L.R. 18 Bom. 92, *Ram Coomar Singh* v. *Kishari*, (1882) I.L.R. 9 Cal. 68 and *Intizam Fatima* v. *Ali Baksh*, (1911) 8 A.L.J. 609, relied on.

Where two exhibits in a suit were the pattas of land of the year 1867, which were put in Court to prove the origin of an anomalous rent under a curious tenure known as *arakandacharam*, the feature of which is that in addition to the ordinary rent which has to be paid by an ordinary ryot the tenant is also required to pay a quarter of the produce to the landholder,

Held, that the pattas were not inadmissible in evidence to prove the nature of the transaction.

Where the plaintiffs' case was that the tenure was an indication that the land was not ryoti land but homefarm land belonging to the Zamindar and that a suit for rent therefore accordingly lay in a Civil Court and not in the Revenue Court, and further that the evidence adduced, consisting of certain early accounts before 1898, were wrongly prevented from being admitted on the ground that they did not purport to be signed by anyone or to be in any particular person's handwriting,

Held, (1) that following *Naina Pillai Marakayar* v. *Ramanathan Chettiar* (1916) 33 M.L.J. 84 and *Chandukutty Nambiar* v. *Rama Varma Raja*, (1939) 2 M.L.J. 593, S. 90 of the Evidence Act could not be relied upon for the proof of a document which did not purport to be in any known person's handwriting and therefore the early accounts were rightly rejected,

and (2) that the suit for the whole of the rent should be brought only in the Revenue Court, because the plaintiffs, at the commencement of the Madras Estates Land Act, were landholders and also transferees of the ryoti interest in part of the land, and the defendants, having been in possession of the ryoti land had acquired occupancy rights.

Petition under S. 115 of Act V of 1908 praying that the High Court will be pleased to revise the order of the Court of the Subordinate Judge of Salem, dated the 17th October, 1938 and made in C.M.A. No. 1 of 1938 (C.M.A. No. 83 of 1937 on the file of the District Court of Salem) preferred against the decree of the Court of the District Munsif of Krishnagiri dated the 29th March, 1937, and made in O. S. No. 205 of 1935.

C. S. Venkatachariar and *D. Ramaswami Aiyangar* for Petitioners.

T. L. Venkatarama Aiyar for Respondents.

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The Court delivered the following

JUDGMENT.—This civil revision petition arises out of an appellate judgment confirming the decision of the District Munsif that a suit filed for rent on certain land situate within an estate under the Madras Estates Land Act is one of which the Civil Courts cannot take cognizance.

The appellants who are the plaintiffs held the estate as successors to an *ijaradar* or lessee from the original landholder. The lands in question have for many years been held under a rather curious tenure known as *arakandacharam* the feature of which is that in addition to the ordinary rent which has to be paid by an ordinary ryot, the tenant is also required to pay a quarter of the produce to the landholder. The plaintiffs' case was that this tenure is an indication that the land is not ryoti land, but homefarm land belonging to the Zamindar and that a suit for the rent thereof accordingly lies in a Civil Court and not in the Revenue Court. Under S. 185 of the Estates Land Act, the burden lies upon the plaintiff to show that the land is not ryoti land. He adduced very little in the way of documentary evidence to indicate the nature and origin of the tenure. There was oral evidence which the trial Court accepts that in some cases, but not invariably, homefarm land in the estate is in fact enjoyed on a tenure similar to that of the defendants. The accounts showing the actual history of the payments of rent in respect of this land before 1898 were excluded from evidence on the ground that they do not purport to be signed by anyone or to be in any particular person's handwriting, and that therefore no presumption can be drawn regarding them under S. 90 of the Evidence Act. It has been suggested by Mr. Venkatachariar that this difficulty with reference to S. 90 of the Evidence Act can be got over by calling in aid S. 32 (*2*). But the latter provision relates only to the relevancy of evidence; not to the manner of its proof. Before a relevant statement is admitted into evidence, its authorship has to be proved. For that purpose, S. 90 is commonly relied upon in the case of old documents the authorship of which cannot be proved by persons who knew the handwriting or can recognise the signature of the maker. It has been held in *Naina Pillai Marakayar* v. *Ramanathan Chettiar*[1] and *Chandukutty Nambiar* v. *Rama Varma Raja*[2], that this section cannot be relied upon for the proof of

1. (1916) 33 M L.J. 84.
2. (1939) 2 M.L.J. 593.

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a document which does not purport to be in any known person's handwritting or to be signed by any known person. I hold that these early accounts were rightly rejected by the lower appellate Court.

The two Courts below have held that though the rent paid by the defendants may differ from that due on other lands in the village known to be held on ryoti tenure, the plaintiffs have not established that the peculiar tenure necessarily indicates that the land is homefarm land. It is pointed out that there is no evidence that the land was ever cultivated by the landholder and that there appears to be no document in which the land is described as *kambattam* or homefarm land.

It is argued for the appellant that the findings of the lower Courts have been vitiated by their reliance upon Exs. I and II, which were not admissible in evidence. These are two old pattas of the year 1867 which have been put forward by the defendants as explaining the origin of this anomalous rent. The defendants' theory was that their predecessors were originally co-tenants along with one Rama Rao, but that they took a sub-lease of Rama Rao's share and that Rama Rao's share was eventually acquired by the landholder and so passed to the possession of the plaintiffs. Now, it cannot be contended that the defendants have proved completely this theory as to the origin of the payment in kind which is part of the rent now payable, but the demonstration that there was originally a co-tenant called Rama Rao does go some way to make this theory probable. Both the Courts below have held that Exs. I and II are inadmissible as proof of the letting to Rama Rao because they were not registered. One of the documents being a patta which provides for an annual rent and the other being a patta which provides for a perpetual lease. Having come to this conclusion, both the Courts below, under the guise of treating these documents as admissible to show the character of the possession, have in fact really used them to prove the transaction itself—the letting to Rama Rao and the terms upon which that letting took place. As I am of opinon that the finding that these documents require registration is unsustainable, I need only refer to the decision in *Mahalakshmamma* v. *Suryanarayana*[1], to indicate the extent to which the collateral use of a document which should

1. (1928) 55 M.L.J. 23: I.L.R. 51 Mad. 977.

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have been registered, can be permitted. Clearly the Courts below, on their own findings, have overstepped these limits. But I doubt very much the correctness of the findings of the Courts below that these two documents required to be registered. In my opinion, they are both pattas within the terms of Ss. 3 and 4 of the Rent Recovery Act VIII of 1865 and I am unable to accept Mr. Venkatachariar's contention that a first patta is not a patta or that a patta which provides for a permanent tenure cannot be a patta within that Act. When once it is conceded that these two documents are pattas under the Rent Recovery Act, they do not require to be registered under the terms of the Registration Act of 1866 which prevailed at the time they were executed. It has, however, been contended that S. 17 of the Registration Act, read with S. 49, excludes from evidence any documents which under the present Registration Act are to be registered, even though under the law which prevailed at the time when the document was executed, registration was unnecessary. It must be admitted that the wording of the first clause of S. 17 is capable of the interpretation which has been put upon it and in the Courts below a very brief judgment of a single Judge of the Lahore High Court was quoted as authority for that interpretation. But there is a considerable body of authority in favour of the contrary view. It has been pointed out that the wording of section 17 repeats the wording of the section of the previous Act and that this wording has not been interpreted as taking away the evidential value of a document which under the law prevailing at the time when it was executed, complied with all the necessary formalities; and it has been pointed out that to interpret S. 17 (1) of the Registration Act, 1908, in its most literal sense would involve the conclusion that a document which did not require registration when it was executed and which could not now be registered owing to lapse of time, would be shut out of evidence—a very anomalous position which would require unambiguous language to justify it. This view has been taken in Bombay (vide *Desai Motilal Mangalji* v. *Desai Parashotam Nandlal*)[1], in Calcutta (vide *Ram Coomar Singh* v. *Kishan*[2],) and in Allahabad (vide *Intisam Fatima* v. *Ali Baksh*)[3], and the only contrary case which has been quoted before me is this very brief decision of a single

1. (1893) I.L.R. 18 Bom. 92. 2. (1882) I.L.R. 9 Cal. 68.
3. (1911) 8 A.L.J. 609.

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Judge of the Lahore High Court. It seems to me there is great weight of authority in support of the more reasonable view that S. 17 (1) of the Registration Act, when read along with S. 6 of the Indian General Clauses Act, does not destroy the validity or the admissibility in evidence of a document which complied with all the necessary formalities as they existed at the time of its execution. I must hold therefore that Exs. I and II are not inadmissible in evidence to prove the nature of the transaction and though I do not agree with the reasoning of the Courts below, their conclusion is, in my opinion, correct.

One further point which has been argued is that on the defendants' case that they pay rent in kind for a portion of their holding as sub-tenants of the assignee of the original ryot the suit so far as it relates to this portion of the rent is triable by a Civil Court. In my opinion this contention must fail. Assuming that the plaintiffs have succeeded to the rights of one Rama Rao who was a tenant under the landholder, it is undeniable that the present state of affairs has existed for very many years. Under S. 8 (1) of the Madras Estates Land Act, whenever before or after the commencement of this Act the occupancy right in any ryoti land vests in the landholder, he shall have no right to hold the land as a ryot but shall hold it as a landholder; and under sub-S. 5 of S. 3 the term 'landholder' includes every person entitled to collect the rents of an estate by virtue of any transfer from the owner. It seems to follow that when the Madras Estates Land Act came into force, the plaintiffs, being the landholders and also transferees of the ryoti interest in part of this land, must hold that land as landholders and not as ryots. The defendants having been in possession of the land, which is certainly on the findings ryoti land, when the Act came into force, they acquired occupancy rights therein.

It follows that the suit for the whole of this rent must lie only in the Revenue Court and the civil revision petition is therefore dismissed with costs.

K. C. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE SOMAYYA.

Marti Satyanarayana .. *Petitioner** (*2nd Respondent*)

v.

Gujavarti Anjareddi .. *Respondent* (*Petitioner*).

Civil Procedure Code (V of 1908), S. 95—'Plaintiff' if includes next friend of minor plaintiff—Compensation for obtaining attachment before judgment on insufficient grounds—If can be ordered against next friend under S. 95. — Satyanarayana v. Anjareddi.

The word 'plaintiff' in S. 95 of the Civil Procedure Code cannot be read as including the next friend of a minor plaintiff. The Court has no jurisdiction to order a next friend to pay compensation under S. 95. The injured party however is not prevented from instituting a suit to recover from the next friend compensation should he wish to do so.

Petition under S. 25 of Act IX of 1887 praying that the High Court will be pleased to revise the decree of the Court of the Subordinate Judge of Masulipatam dated the 2nd August, 1937, and made in M. P. No. 1628 of 1936 in S. C. S. No. 70 of 1936.

P. Somasundaram and *P. Satyanarayana* for Petitioner.

A. Lakshmayya for Respondent.

The judgment of the Court was delivered by

The Chief Justice.—In this petition the Court is called upon to decide whether the word 'plaintiff' in S. 95 of the Code of Civil Procedure must be deemed to include the next friend of a minor plaintiff. — Leach, C.J.

S. 95 provides that where in a suit in which an arrest or attachment has been effected or a temporary injunction granted under S. 94, it appears to the Court that the application was made on insufficient grounds, or the suit fails and it appears that there was no reasonable or probable ground for its institution, the defendant may apply to the Court, and the Court may award against 'the plaintiff' reasonable compensation; not exceeding Rs. 1,000, for the expense or injury caused to him. An order determining an application of this nature bars a suit for compensation.

In the present case the petitioner, as the next friend of a minor, filed in the Court of the Subordinate Judge of Masulipatam a suit against the respondent and at the same time filed an application for the attachment before judgment of property

* C. R. P. No. 832 of 1938. 12th March, 1941.

Satyanarayana v. Anjareddi.

Leach, C.J.

belonging to the respondent. The claim was on a promissory note. The application for attachment before judgment was granted, but in the course of the suit it became apparent that the application ought not to have been made and the respondent applied for an order against the petitioner and the minor plaintiff under S. 95. The Subordinate Judge held that the minor plaintiff was not responsible for the filing of the application for attachment before judgment. Clearly he was not. The responsibility rested entirely with the petitioner. Accordingly, the Subordinate Judge passed an order against the petitioner directing him to pay to the respondent a sum of Rs. 200 by way of compensation.

S. 95 only speaks of the award of compensation against the 'plaintiff'. The Court must be very careful in interpreting the expression not to extend the meaning unduly. To do so might lead to difficulty in respect of other provisions of the Code. O. 32, r. 14 permits a minor plaintiff on attaining majority to apply to the Court for the dismissal of a suit instituted in his name by his next friend on the ground that it was unreasonable or improper, and the Court may grant the application and order the next friend to pay the costs of all parties. There is here strong indication that in using the word 'plaintiff' in S. 95 the Legislature intended to confine the application under that section to an application against the plaintiff himself, because when providing for an order against the next friend in O. 32, r. 14 it makes express provision to this effect. In *Ramathari Patro* v. *Govinda Rona*[1], Varadachariar, J., observed:

> "The section only says that the award of compensation is to be against the plaintiff, and the plaintiff in the action is undoubtedly the minor and not the guardian."

Although the question now before us did not fall for decision in that case the learned Judge was obviously disinclined to read the word 'plaintiff' in S. 95 as including the next friend, and we consider that he was right.

In *Elumalai Naicker* v. *Kuppammal*[2], a Bench of this Court held that the Court had power to direct the next friend of a minor who had sued in *forma pauperis* to pay the court-fee to Government. This decision was based on the opinion

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1. (1935) 69 M.L.J. 487.
2. (1929) 58 M.L.J. 623: I.L.R. 53 Mad. 716.

that S. 35 of the Code of Civil Procedure, which refers to costs, was wide enough to cover a direction to the next friend to pay the court-fee. S. 35 is couched in very wide terms. It gives the Court full power to determine by whom or out of what property and to what extent costs are to be paid, but S. 95 is limited in its wording.

Two English cases have been referred to in the course of the argument—*Jones* v. *Lewis*[1] and *Catt* v. *Wood*[2]. In the former of these cases it was held by Knight Bruce, Vice Chancellor, that the petition of an infant plaintiff in a cause was the petition of his next friend, and the next friend was ordered to pay the costs. The ground for the order for costs was that the Vice Chancellor had always understood that in a cause in which there was an infant suing by his next friend, a petition presented by the infant plaintiff was treated as the petition of the next friend. In the present case, the Court is concerned with the construction of a section in an Act of the Indian Legislature, and in construing a statute the words used must be given their ordinary meaning unless the context otherwise demands, which is not the case here. In *Catt* v. *Wood*[2], the Court was concerned with the construction of the rules of a friendly society. The rules there under consideration have nothing in common with S. 95. We do not regard anything said in the judgment in that case as having application here.

We hold that the word 'plaintiff' in S. 95 must be confined to the plaintiff. We can see no reason why it should be deemed to include a next friend. Our decision is based on a strict construction of the section, but this construction does not prevent an injured party from instituting a suit to recover from the next friend compensation should he wish to do so.

In making an order against the petitioner requiring him to pay compensation to the respondent the Subordinate Judge acted without jurisdiction. Consequently, the petition will be allowed with costs here and below.

K. S. *Petition allowed.*

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1. (1847) 1 DE. G. & S.M. 245: 63 E.R. 1052.
2. (1908) 2 K.B. 458.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT—MR. JUSTICE VENKATARAMANA RAO.

The Madura Municipality through its Executive authority, the Commissioner. *Appellant** (*Defendant*)

v.

K. Nataraja Pillai and another .. *Respondents* (*Plaintiffs*).

Madura Municipality *v.* Nataraja Pillai.

Madras District Municipalities Act (V of 1920), S. 145—Flush-out latrines—Erection by Municipality constituting private nuisance—Claim to restrain—Erection under statutory duty—If defence.

A suit was filed against the Madura Municipality for an injunction restraining it from erecting a public flush-out latrine on the ground that it obstructed plaintiff's right of free access to the road from the back of his house and also prevented a full view of his house. The Municipality contended that the erection in question was authorised under S. 145 of the District Municipalities Act being one of their compulsory statutory duties even if it amounted to a private nuisance.

Held, that the erection of the public flush-out latrine, as it was found to amount to a nuisance, cannot be taken to be authorised by S. 145 of the District Municipalities Act. *Vernon* v. *Vestry of St. James, Westminster.* (1880) 16 Ch. D. 449 applied. The difference between the terms of the local enactment and the English statutes should be regarded as immaterial for this purpose.

Appeal against the decree of the District Court of Madura in A. S. No. 63 of 1936 preferred against the decree of the Court of the District Munsif of Madura Town in O. S. No. 37 of 1936.

K. Rajah Aiyar and *C. S. Rama Rao Saheb* for Appellant.

A. Ramaswami Aiyar and *N. Sivaraj* for Respondents.

The Court delivered the following

JUDGMENT.—This Second Appeal arises out of a suit for an injunction to restrain the defendant Municipality from constructing a public latrine behind the plaintiff's fruit stall in Madura. Both the lower Courts have concurrently found that the erection of a latrine would constitute a nuisance to the plaintiff and held that the plaintiff was entitled to the relief claimed. Hence this appeal by the Municipality.

The finding that the erection of a latrine is a nuisance to the plaintiff is a finding of fact and cannot therefore be challenged in second appeal. The contention of Mr. Rajah Aiyar who appeared for the appellant is that under the District Municipalities Act the Municipality is empowered to construct

* S.A. No. 594 of 1937. 3rd March, 1941.

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public latrines in suitable places and S. 145 of that Act confers on them such a right and that no action can lie against them. The question is whether this contention is tenable. S. 145 of the District Municipalities Act runs thus:

"The Council, shall, as far as the funds at its disposal may admit, provide and maintain in proper and convenient places a sufficient number of public latrines and shall cause the same to be daily cleansed and kept in proper order."

The principle that is adopted in construing statutes which empower public bodies to do works of public utility is thus laid down by James, L.J., in *Vernon* v. *Vestry of St. James, Westminster*[1]:

"*Prima facie* nobody is authorised to commit a nuisance, and nobody is to be held so authorised under an Act of Parliament unless it appears from express words or by necessary implication that the act was to be done or might be done notwithstanding its tending to the creation of a nuisance . . . . If private rights are to be interfered with, they must be interfered with by express legislation. . . . ."

The question in that case was whether the erection of a public urinal was a nuisance and whether it was open to the Court to restrain the Vestry of St. James, Westminster which was a body authorised under an Act of Parliament to provide and maintain urinals in places where they might deem such accommodation to be required, from erecting it. An injunction was granted in that case on the ground that the erection of the urinal would constitute a nuisance so grave and so serious that the neighbours who sought the relief were entitled to the injunction prayed for. Cotton, L.J., discussed the question as to when a statute might be deemed to authorize a nuisance. He observed as follows:

" . . . we must look to the whole of the section and see whether it justifies their erecting and maintaining a nuisance. It is impossible to say that an urinal or water-closet must necessarily be a nuisance. If it could be made out that such an erection, wherever placed and however guarded, must of necessity be a nuisance, then it would be true that the Act of Parliament had authorised a nuisance, and the Court could not have interfered; but common sense tells us that it cannot be said that no water-closet or urinal can possibly be erected without being a nuisance. Therefore the mere fact that an urinal is authorised to be erected does not necessarily or by necessary implication give Parliamentary power to do it if it is a nuisance. Power to erect these conveniences is no doubt given to them, but subject to this, that they must not exercise it in such a way as to create a nuisance, because the section contains nothing to exempt them from the general law which prevents any one from erecting or maintaining a nuisance."

1. (1879) 16 Ch. D. 449 at 466.

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The language of the section in that case was that:

"It shall be lawful for every Vestry and District Board to provide and maintain urinals in situations where they deem such accommodation to be required."

Mr. Rajah Aiyar contended that the language of that section was different from the language of S. 145 of the District Municipalities Act. But I do not think that by the mere use of the word 'shall' it was intended that the Municipality was authorized to commit nuisance. It may be noticed that in *London and Brighton Railway Co.* v. *Truman*[1], a case which I shall discuss at length later, the expression used in S. 82 of the Act, 1 Vict. C. 119, was 'it shall be lawful'. Their Lordships of the Privy Council in that case held that S. 82 authorized a nuisance having regard to the scope of the Act. Thus from the mere use of the words 'shall' and 'it shall not be lawful' it does not necessarily follow that the statute intended in the one case to authorize a nuisance and in the other, not. What was the intention of the Legislature in any particular Act is a question of the construction of the Act as pointed out by Lord Blackburn in *Metropolitan Asylum District* v. *Hill*[2]. It cannot be contended as pointed out by Cotton, L. J., that the erection of a urinal wherever placed must of necessity be a nuisance. The fact that an obligation was imposed upon the Municipality to provide and maintain public urinals in convenient places would not empower them to erect urinals in such a way as to create a nuisance.

Mr. Rajah Aiyar relied on a number of cases which do not lay down anything in conflict with this principle. One of the cases relied on by him was *Metropolitan Asylum District* v. *Hill*[2], and he laid stress on the observations of Lord Watson as to the distinction between permissive and imperative statutes. But the learned Lord himself explains when a statute can be deemed to authorize a nuisance. At page 212 he remarks thus:

". . . . I do not think that the Legislature can be held to have sanctioned that which is a nuisance at common law, except in the case where it has authorized a certain use of a specific building in a specified position, which cannot be so used without occasioning nuisance, or in the case where the particular plan or locality not being prescribed, it has imperatively directed that a building shall be provided within a certain area and so used, it being an obvious or established fact that nuisance must be the result. In the latter

1. (1885) 11 A.C. 45. 2. (1881) 6 A.C. 193 at 203.

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case the onus of proving that the creation of a nuisance will be the inevitable result of carrying out the directions of the Legislature, lies upon the person seeking to justify the nuisance."

It is not contended before me that the inevitable result of carrying out the provisions of S. 145 will be always the creation of a nuisance. Mr. Rajah Aiyar, also relied upon *Biddulph* v. *The Vestry of St. George, Hanover Square*[1], but that case is distinguishable, because the finding there was that from the evidence as it stood it did not appear to be certain or probable that the works intended by the defendants in that case would create in point of law a nuisance. Considerable reliance was placed by Mr. Rajah Aiyar, on *Muhammad Mohidin Sait* v. *The Municipal Commissioners for the City of Madras*[2], and particularly on certain observations of the learned Chief Justice in that case. The finding in that case was that no actionable nuisance had been proved. Moore, J., rested his decision solely on this ground and remarked thus:

"Taking the evidence therefore as a whole, it must, in my opinion, be held that no nuisance whatever has been caused to the plaintiff by the burial ground. There is some evidence that the burning ground is a source of nuisance to a certain extent to any one occupying the plaintiff's premises. . . . . . . The plaintiff in order to be entitled to either an injunction or damages must show that the injury suffered by him is not merely nominal but real and substantial. This he has in my opinion failed to prove."

The learned Chief Justice also found that no actionable nuisance had been proved but he went on to observe that even if it were proved, the City Municipal Act afforded the defendant Municipality a statutory immunity from liability. In arriving at this conclusion he relied upon the language of S. 392 of the Act which empowered the Municipality to acquire lands for burial and burning grounds and on S. 458 of the Act which gave a right of action to any person aggrieved by the failure of the Commissioners to perform a duty imposed upon them by the Act. He also relied on two other sections of the Act which gave compensation for the land acquired and also for the injury done in pursuance of the power exercised under the Act. Distinguishing the case in *Metropolitan Asylum District* v. *Hill*[3], the learned Chief Justice remarked thus:

"The present case may also be distinguished on the ground that the Legislature in the present case clearly *contemplated and authorised some interference with private rights of property since S. 392 empowers the*

1. (1863) 33 L.J. Rep. Ch. 411. 2. (1901) I.L.R. 25 Mad. 118.
3. (1881) 6 A.C. 193.

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Commissioners to acquire land compulsorily for the purpose of burning grounds In the hospital case the Statute gave no power to acquire land compulsorily." (The italics are mine).

In some cases the power to acquire land was taken as an indication that the Legislature authorised interference with private rights. No such power of acquisition is given under the District Municipalities Act for the purpose of erecting urinals. The learned Chief Justice was of the opinion that the case before him was governed by *London and Brighton Railway Co.* v. *Truman*[1]. But on facts that case was distinguishable from the case in *Muhammad Mohidin Sait* v. *The Municipal Commissioners for the City of Madras*[2], and the observations of the learned Chief Justice which seem to indicate that it is not, if I may say so with respect, do not appear to be correct. In the case in *London and Brighton Railway Co.* v. *Truman*[1], the Railway company was authorised to acquire 50 acres of land for the purpose of erecting cattle sheds. S. 82 of the Act authorised them to purchase lands in such places as shall be deemed eligible and that section was construed by the Earl of Selborne thus:

" . . . although no exact site or local limits may be prescribed by the terms of the authority for the acquisition of that land, yet being directly subsidiary to the general traffic of the line, it follows from the very nature of the purposes authorised that *it must be land contiguous to the railway or some of its stations, the local situation of the whole line of railway being within certain limits of deviation defined by the Act.*" (The italics are mine).

Having given this interpretation namely, that the acquisition contemplated was within a limited area, the learned Lord held that the statute authorised the nuisance and he summed up his conclusion thus:

" When acquired it must become part of the railway and its appurtenances in exactly the same way as if similar loading and unloading places had been made upon lands taken when the railway was first made, whether by compulsion or by agreement. It would be (as it seems to me) inconsistent and unreasonable to suppose that the Legislature intended land so acquired, for such purposes, to be separated, as to the legal conditions of its tenure and use for those purposes, from the rest of the undertaking with which it would have become incorporated, and as to which the rule, that what is authorised is not actionable, is acknowledged to prevail."

Lord Halsbury also expressed himself to a similar effect:

" . . . it seems hardly to admit of argument that the statute intended such additional accommodation, when provided, to form part of and to be used with the railway, and, if so, *to share the immunity which the railway,*

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1. (1885) 11 A.C. 45. 2. (1901) I.L.R. 25 Mad. 118.

in its original construction, would have enjoyed from actions levelled at its use. It would be strange, indeed, if the Legislature could be supposed to have authorised the railway to commit a nuisance upto a certain point, to have provided machinery for extending the railway and its use beyond that point, and yet to have allowed the further user to be open to an action to restrain its use." (The italics are mine).

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Thus their Lordships having regard to the scope of the Act thought that the contemplated acquisition must share the same immunity which frees a Railway company from liability for any commission of nuisance in the use of the functions with which the statute has entrusted them. The following passage from Lord Halsbury's judgment makes this clear:

" It cannot now be doubted that a railway company constituted for the purpose of carrying passengers or goods or cattle are protected in the use of the functions with which Parliament has entrusted them. if the use they make of those functions necessarily involves the creation of what would otherwise be a nuisance at common law."

It is therefore doubtful whether the view taken by the learned Chief Justice in *Muhammad Mohidin Sait* v. *The Municipal Commissioners for the City of Madras*[1], that the City Municipal Act authorised the nuisance can be justified on the strength of the decision in *London and Brighton Railway Co.* v. *Truman*[2]. However the observations are obiter.

It is unnecessary for me to refer to the other cases cited by Mr. Rajah Aiyar, as they do not carry the matter further. The view of the learned District Judge is correct and the second appeal accordingly fails and is dismissed with costs.

Leave to appeal refused.

K. S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

Karuppanna Goundan .. *Petitioner* (Defendant)*

v.

Marutha Pillai .. *Respondent (Plaintiff).*

Karuppanna Goundan *v.* Marutha Pillai.

Madras Agriculturists' Relief Act (IV of 1938), S. 8—Explanation—Hindu joint family debt—Partition—Fresh document by a member not an executant of the original note—If renewal.

Where there is a debt due by a joint Hindu family, which is a 'person' under S. 3 (1) of the Madras Agriculturists' Relief Act, for which is substituted another debt due by an individual who formerly constituted part of

1. (1901) I.L.R. 25 Mad. 118. 2. (1885) 11 A.C. 45.

* C. R. P. No. 1206 of 1939. 27th February, 1941.

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that 'statutory person', there is a different debtor and it will be carrying the theory of property liability too far to treat this different debtor as merely renewing his own liability which had resulted from an interest in the joint family property.

Perianna v. *Sellappa*, (1938) 2 M.L.J. 1068: I.L.R. 1939 Mad. 218, distinguished.

Accordingly where on a partition in the debtors' family a debt evidenced by a promissory note dated 2nd March, 1925, executed by the defendant's father and brother was allotted to the defendant who thereafter executed the suit promissory note on 12th July, 1932, in discharge of the prior note, and the defendant applied for scaling down,

Held, that the defendant's debt is not due from the same debtor as the original debt and cannot therefore be regarded as a renewal or inclusion in a fresh document of that debt.

Petition under S. 25 of Act IX of 1887, praying that the High Court will be pleased to revise the decree of the Court of the Subordinate Judge of Dindigul in S.C.S. No. 139 of 1938.

K. S. Desikan and *K. Raman* for Petitioner.

S. Panchapagesa Sastri for Respondent.

The judgment of the Court was delivered by

Wadsworth, J.

Wadsworth, J.—This Civil Revision Petition raises a question under S. 8 of Madras Act IV of 1938. The facts have not yet been established by evidence, but assuming them to be as asserted by the petitioner who was the defendant in the Court below, they are as follows:—On 2nd March, 1925, the defendant's father and brother executed a promissory note in renewal of a series of earlier debts. At some time after the execution of this note the family divided and in the partition this debt was allotted to the defendant. In pursuance of that arrangement, on 12th July, 1932, the defendant alone executed the suit promissory note, discharging the prior promissory note executed by his father and brother. The question is whether in such circumstances the second note can be deemed to be a renewal of the earlier debt.

We have held that in order to apply the explanation to S. 8 the debtor must be the same, though there need not be a complete identity of the debtors under the earlier and the later documents. For instance, we have held that where there is a joint and several debt due by *A* and *B* discharged by a later debt by *A* alone, *A* can claim that his debt is a renewal of the earlier debt. Similarly, we have held that where there is a joint family debt evidenced by a promissory note executed by one of the co-parceners and this debt is discharged by a fresh

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promissory note executed by another of the co-parceners the debtor in each case being the joint family, there is a substantial identity of the debtors and there can be a renewal. We have also held that where there is a family debt incurred by a joint family consisting of *A*, *B*, *C* and *D* and after *D* has left the joint family there is a fresh document executed by the three remaining co-parceners, there is a substantial identity of the debtor—who is the joint family under each debt and the second document can be deemed to be a renewal or inclusion in a fresh document of the earlier debt. The present case goes further than any of these cases. Here we have what is alleged to be a joint family debt, evidenced by a promissory note executed by two co-parceners and after the disruption of the family, the substitution of a fresh note executed by one of the former co-parceners who was not nominally a party to the earlier debt. It is argued that the defendant was under a liability to pay the earlier debt, being a member of the family and that that debt might have been enforced against his interest in the family properties and that in executing the fresh promissory note, he must be deemed to be discharging his own pre-existing property liability. This argument, of course, follows the reasoning in the case of *Perianna* v. *Sellappa*[1], which we have adopted in numerous cases. But we doubt very much whether the principle of that case should govern the decision of the present case. It is true that the defendant was a member of the family which is alleged to have been liable to satisfy the earlier debt and that that debt might have been enforced against his interest in the family property. But we must remember that Act IV of 1938 treats the Hindu joint family as a unit for the purpose of the Act. The definition of "person" in S. 3 (1) states that "person" means an individual and includes an undivided Hindu family: and throughout the Act an undivided Hindu family is treated as if it were a person, with the solitary exception that in the case of a family made up of agriculturist and non-agriculturist members special provisions are contained in S. 14 for working out their several liabilities. Apart from this provision the family is regarded as a person who may be represented by one or other of the co-parceners, as under S. 19. It seems to follow that when there is a debt due by this statutory person—a joint family—for which is substituted another debt due by an

1. (1938) 2 M.L.J. 1068: I.L.R. 1939 Mad. 218.

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individual who formerly constituted part of the statutory person, there is a different debtor and it seems to us that to treat this different debtor as merely renewing his own liability which resulted from an interest in the joint family property, is to carry the theory of the property liability too far. When once it is accepted that the debtor must be substantially the same in both transactions, on the fact that the first debtor was a joint family and the second debtor was a divided individual, it must in our opinion be held that the second debt is not due from the same debtor as the first debt and cannot therefore be regarded as a renewal or inclusion in a fresh document of that debt. The petition is therefore dismissed with costs.

K.S. *Petition dismissed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice,* MR. JUSTICE SOMAYYA AND MR. JUSTICE PATANJALI SASTRI.

(In the matter of the Indian Income-tax Act, 1922).

S. S. S. Chokkalingam Chettiar and sons, members of a Hindu joint family having banking business at Kandanoor, Ramnad District and other places, through the Manager, S.S.S. Chokkalingam Chettiar ... *Petitioners**

v.

The Commissioner of Income-tax, Madras ... *Respondent.*

F.B.

Chokkalingam Chettiar v. Commissioner of Income-tax, Madras.

Income-tax—Assessee holding two mortgages over same property—Security insufficient even for first mortgage—Suit for principal and interest of only the first mortgage giving up claim in respect of the second—Right to deduction for bad debt—Substance of the matter as distinct from the legal position—Not to be regarded in revenue cases.

The assessee held in his favour a first mortgage for Rs. 40,000 and a second mortgage for Rs. 10,850 over the same property. In the year of assessment, when the principal and interest due on the first mortgage was Rs. 71,220 the assessee filed a suit limiting his claim to Rs. 50,000 on the first mortgage and giving up his claim in respect of the second mortgage, as the security was not worth more than Rs. 50,000. The assessee claimed a deduction of Rs. 10,850 (the amount due under the second mortgage) from his

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*O. P. No. 204 of 1940. 18th March, 1941.

profits as bad debt. It was contended on behalf of the Crown that the two mortgages were in substance one transaction and the suit must be deemed to be one for the recovery of the principal due under both the mortgages and that the claim for deduction was not tenable.

Held, that the assessee had in truth and in fact incurred a loss of capital of Rs. 10,850 on the second transaction which he was entitled to have deducted as a bad debt. The substance of the matter as distinguished from the strict legal position cannot be regarded in revenue cases.

F.B.

Chokkalingam Chettiar *v.* Commissioner of Income-tax, Madras.

Reference to this Court by the Commissioner of Income-tax, Madras under S. 66 (3) of the Indian Income-tax Act XI of 1922 in pursuance of the order made herein and dated the 23rd September 1940, for decision on the following question *viz.*:

"Is the assessee entitled to deduct the whole of the Rupees ten thousand eight hundred and fifty (Rs. 10,850) due to him on the second mortgage when computing his profits for the assessment year 1938-39?"

K. Krishnaswami Aiyangar and *T. P. Gopalakrishna Aiyar* for Petitioner.

K. V. Sesha Aiyangar for Respondent.

The judgment of the Court was delivered by

Leach, C.J.

The Chief Justice.—The assessee was a partner in a money lending firm carrying on business in Rangoon. The firm was dissolved and as his share of the assets the assessee was allotted two debts due by a customer of the firm. These debts were secured on mortgages of immovable properties. In the first place the customer was given an advance of Rs. 40,000 and in respect of this sum a first mortgage of the properties was created. Later he was given a further advance of Rs. 10,850, which was secured by a second mortgage of the same properties. As the result of the arrangement entered into on the dissolution of the partnership the assessee became the lender of the two sums and entitled to realize the security which had been given. He filed a suit against the debtor, but as he considered that the properties were not worth more than Rs. 50,000, he limited his claim to this amount. With interest the amount due on the first mortgage was Rs. 71,220. He waived Rs. 21,220 of the interest due and asked for a decree on the first mortgage for Rs. 50,000. He regarded the second loan, that is, the loan of Rs. 10,850, as being irrecoverable and accordingly he did not ask for a decree in respect of this amount.

For the assessment year 1938-39 the assessee has been assessed on an income of Rs. 22,394. Included in this sum is Rs. 19,260 which the Income-tax Officer regarded as being the

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amount of the net profits of the assessee's business in Burma for the year of account. The assessee says that the Income-tax Officer here erred as he should have reduced the amount by Rs. 10,850, the loss which he had suffered in respect of the second mortgage. This claim was disallowed and the reasons set out in the case submitted to this Court by the Commissioner are that in the assessee's books the two mortgage debts are debited against the debtor in a single folio and that as he only expected to recover Rs. 50,000 from the debtor there was no loss in respect of the second loan of Rs. 10,850 except to the extent of Rs. 850, which had been allowed. What has apparently operated in the mind of the Commissioner is that the suit was filed to recover a sum of Rs. 50,000 which was roughly the amount of the two principal sums of Rs, 40,000 and Rs. 10,850. It would seem that the Commissioner has had regard to what he considers to be the substance of the matter, not the strict legal position. This the Commissioner is not entitled to do and the Privy Council has protested against assessments being made on such a basis. In the recent case of *the Bank of Chettinad Ltd.* v. *The Commissioner of Income-tax, Madras*[1] the Board considered it necessary once more to protest against the suggestion that in revenue cases 'the substance of the matter' may be regarded as distinguished from the strict legal position, and reference was made in the judgment to the disapproval of this doctrine expressed in *Inland Revenue Commissioners* v. *Westminster (Duke)*[2].

Now what is the strict legal position here? The assessee was entitled to bring a suit against his debtor for the purpose of recovering the amounts due on both the mortgages. If he had sued on both the mortgages he would have been entitled to appropriate in the first place the proceeds of the sale of the immovable properties to the principal and interest due on the first mortgage. Only if they were sufficient to discharge both the principal and interest due on the first mortgage could there be any appropriation towards the second mortgage. It has not been suggested that the assessee erred in regarding Rs. 50,000 as being the outside value of the mortgaged properties. It has been stated at the Bar that at the sale which took place in pursuance of the decree which was eventually obtained the pro-

1. (1940) 2 M.L.J. 851: I.L.R. (1941) Mad. 89 (P.C.).
2. (1936) A.C. 1.

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perties did not realize more than Rs. 27,000. But be this as it may, it must for the purposes of this case be taken that at all material times the total security was not worth more than Rs. 50,000 and the debtor had no other property. Therefore, there could be nothing left for the discharge of the second mortgage, which means that the assessee has in truth and in fact lost Rs. 10,850 on the second transaction without taking into consideration his loss of interest on this sum. The loss had been ascertained in the year of account and the assessee was entitled to have it taken into consideration in calculating his income for the purpose of taxation.

For these reasons we answer the question referred in the affirmative. As the assessee has succeeded he will be awarded costs which we fix at Rs. 250. The deposit of Rs. 100 will be refunded.

K.S. *Reference answered in the affirmative.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE HAPPELL.

Sree Rajah Vatchavaya Venkatasuryanarayana Jagapathiraju Bahadur Zamindar Garu. *Appellant* (Plaintiff—Appellant — Appellant)*

v.

Maddukuri Tirupatayya and others .. *Respondents (Defendants—Respondents—Respondents).*

Jagapathiraju *v.* Tirupatayya.

Local Boards Act (XIV of 1920), Ss. 88 and 89—Suit to recover cess for six years under the Act—Suit in Revenue Court—Aid of Madras Estates Land Act (I of 1908), sought—How far in the circumstances that Act could be helpful.

A landholder who wishes to recover cess does not need to sue in the Revenue Court, but if he does so he is restricted to what that Court can give him.

Thus where a Zamindar sued his under-tenure-holders in the Revenue Court to recover from them what he had been compelled to pay as cess under the Madras Local Boards Act in respect of 6 faslis, and the respondents contested his right to sue for more than what he had paid for 3 faslis,

Held, that the landholder could not be allowed to sue in the Revenue Court for a greater period than that allowed by the Madras Estates Land Act, that is, for more than three years. There cannot be any difference in

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* L. P. A. No. 37 of 1939. 26th February, 1941.

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principle when distraint is levied or property is sold summarily and when a suit is brought under S. 77 of the Madras Estates Land Act.

Appeal under Cl. 15 of the Letters Patent against the judgment of the Hon'ble Mr. Justice Wadsworth dated 27th April, 1939, and passed in S. A. No. 203 of 1938 preferred against the decree of the District Court of East Godavari at Rajahmundry in A. S. No. 172 of 1936 preferred against the decree of the Court of the Deputy Collector of Peddapuram Division in Land Suit No. 74 of 1935.

P. Somasundaram for Appellant.

V. Viyanna for Respondents.

The judgment of the Court was delivered by

Leach, C.J.

The Chief Justice.—The appellant is the Zamindar of Tuni and sued in the Court of the Deputy Collector of Peddapuram to recover from the respondents in this appeal what he had been compelled to pay by way of cess under the Madras Local Boards Act, 1920, in respect of faslis 1338 to 1343. The respondents are *darmilla inamdars,* or under-tenure-holders, within the zamindari. They contested the right of the appellant to sue for more than what he had paid in respect of the last three faslis. Their contention was that as the appellant in suing in the Revenue Court had called in aid the Madras Estates Land Act he could not recover for more than three years. This contention was accepted by the Deputy Collector, by the District Judge of East Godavari on first appeal and by Wadsworth, J., on second appeal. This appeal is from the judgment of Wadsworth, J., who gave the necessary certificate under Cl. 15 of the Letters Patent.

By virtue of S. 88 of the Madras Local Boards Act, the appellant has the right to recover from the respondents the amounts which he claimed, and if he had instituted the suit in the Civil Court it is not contested that he would have been entitled to a decree for what he had paid by way of cess during the six years preceding the suit. In *Raja of Visianagaram* v. *Thammanna*[1], a Full Bench of this Court held that a suit which had been filed in a Civil Court to recover cesses under the Madras Local Boards Act was governed by Art. 120 of the Limitation Act. The respondents rely however, on the provi-

1. (1937) 1 M.L.J. 91: I.L.R. (1937) Mad. 498 (F.B.).

Jagapathiraju v. Tirupatayya.

Leach, C.J.

sions of S. 89 of the Act. That section says:—

"Every landholder, sub-landholder or any other intermediate landholder, as the case may be, shall, in recovering any amount which may be due to him under the provisos to S. 88, be entitled to exercise the same powers as may, under any Act or Regulation which now is, or hereafter may be, in force, be exercised by any landholder in the recovery of rent, and shall be liable to all the penalties prescribed therein for the abuse of such powers.

Explanation. A landholder or sub-landholder shall, in recovering the amount due to him, under the first proviso to S. 88 from the intermediate landholder referred to therein, be entitled to exercise the powers and be subject to the penalties specified in this section, as if the intermediate landholder were a ryot with whom a patta and muchilika had been exchanged and the provisions of the Madras Estates Land Act, 1908, shall, so far as may be, be applicable thereto."

By reason of this section the appellant is given the right, if he so chooses, to use the same machinery as a landholder is allowed to use for recovering arrears of rent from a ryot.

The Madras Estates Land Act gives the landholder three remedies, namely:—(1) He may sue in the Revenue Court for the recovery of what is due to him, (2) without recourse to a suit in the Revenue Court he may distrain for rent, or (3) he may sell the holding through the Collector without recourse to a suit. S. 77 expressly provides that a landholder shall be entitled to recover any arrear of rent by a suit before the Collector, by distraint and sale of moveable property belonging to the tenant or by the sale of the ryot's holding. If he institutes a suit in the Revenue Court he cannot recover arrears of rent for more than three years. This is the effect of Art. 3 of Part A of the Schedule. If he distrains he is limited to the rent which has accrued due within the twelve months preceding the demand under S. 78. This provision is contained in S. 77-D. If a landholder wishes to sell the holding without recourse to a suit he is again limited to one year's rent—see Ss. 111 and 112.

Mr. Somasundaram on behalf of the appellant has frankly conceded that a landholder who wishes to recover from an under-tenure-holder cess paid by him under the Madras Local Boards Act, cannot, by using the machinery provided by the Madras Estates Land Act, distrain for more than one year's cess or sell in the summary manner provided by S. 111 and the connected sections for more than one year's arrears. In these circumstances it is very difficult to understand why he should be allowed to sue in the Revenue Court for a greater period

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than that allowed by the Madras Estates Land Act. A suit in the Revenue Court is of a summary nature and therefore is subject to less delay than that entailed in a suit in a Civil Court. The landholder who wishes to recover cess does not need to sue in the Revenue Court, but if he does so he is restricted to what the Court can give him. Mr. Somasundaram has argued that the Madras Estates Land Act does not expressly cut down his rights under the Madras Local Boards Act. That is true, but if he appeals to the Madras Estates Land Act to help him to recover what is due to him he can get nothing more than what that Act contemplates. As already indicated there cannot be any difference in principle when distraint is levied or property is sold summarily and when a suit is brought under S. 77 of the Madras Estates Land Act.

For these reasons we consider that the learned Judge was right and that the appeal should be dismissed with costs in favour of the second respondent, who alone is represented by counsel.

K.C. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT:—MR. JUSTICE KING AND MR. JUSTICE PATANJALI SASTRI.

Venkadari Somappa .. *Appellant** (*Defendant*)

v.

Naresepally Venkataswamy Chetty. *Respondent* (*Plaintiff*).

Somappa v. Venkataswami Chetty.

Madras Ariculturists' Relief Act (IV of 1938), S. 3 (A)—Appellant paying income-tax—Whether entitled to benefit of the Act.

Where a partnership of which the appellant was a member had been assessed to income-tax, on the question whether he was precluded from claiming the benefit of the Madras Agriculturists' Relief Act, by reason of such assessment to tax,

Held, that when the income of a partnership is assessed to tax, what is really assessed is the income of the individual partners, and it being clear, that whether his income fell below the taxable minimum or not, the appellant had thus undoubtedly been subjected to income-tax, he came within proviso (A) to S. 3 and therefore should not be deemed to be an agriculturist.

Appeal against the decree of the District Court of Bellary dated the 14th September, 1938 and made in O. S. No. 3 of 1937.

Ch. Raghava Rao for Appellant.

K. Rajah Aiyar and *S. Narasinga Rao* for Respondent.

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* Appeal No. 72 of 1939. 19th February, 1941.

The judgment of the Court was delivered by

King, J.—The only question involved in this appeal is whether the appellant is an agriculturist entitled to claim the benefit of Act IV of 1938. The learned District Judge of Bellary has held that he is not an agriculturist firstly because he has been assessed to income-tax under proviso (A) to S. 3 and secondly because he has paid house-tax under proviso (*c*). We may say at once that the second reason cannot be substantiated. The language of proviso (*c*) is that he should be assessed to house-tax. The only evidence is an admission by the appellant that he had gifted certain houses to his wife and that his wife pays taxes on those houses. There is nothing in the case to show, whether this statement could be believed or not, that the houses have been assessed as the property of the appellant.

On the first ground however the order of the learned District Judge must, we think, be upheld. The facts are that the appellant was a partner in a ginning factory and was entitled to one-fourth share of the profits and that the factory was assessed to income-tax for its profits in the year 1937-38. It is argued by Mr. Raghava Rao on behalf of the appellant that because no specific notice was addressed to him by the Income-tax authorities as an individual and because it is only the partnership which has been taxed he himself has not been assessed to income-tax within the meaning of the proviso (A). It seems to us impossible to read the expression 'assessed to income-tax' in the present case in so narrow a sense. It cannot be denied that when the income of a partnership is assessed to tax under the Act what is really assessed is nothing else than the income of the individual partners; and we think that to say that a person has been assessed to income-tax may properly be paraphrased by saying that he has paid income-tax, or that his income has been subjected to income-tax or has been reduced by the amount of the income-tax. In this sense it is quite clear that the appellant has been assessed to income-tax. He was entitled to one-fourth share of the profits of the factory and he must have received those profits less the amount of tax paid by the partnership upon them. Of course it is possible that, in spite of his share of the profits being thus subjected to tax, his total income for the year 1937-38 may have been below the taxable minimum. In that case provision exists in the Act

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King, J.

under S. 48 for an application to be made by the appellant for the refund of the tax upon his share of the income of the factory. There is no evidence in the case that the appellant made any such application for refund. The result is that whether his income in fact fell below the taxable minimum or not it has undoubtedly been subjected to income-tax and in our opinion there can be no doubt that he comes within proviso (A) of S. 3. He cannot therefore be deemed to be an agriculturist or entitled to the privileges of the Act.

The appeal must fail and is dismissed with costs.

K. C. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, AND MR. JUSTICE SOMAYYA.

M. Ramalinga Aiyar .. *Petitioner**

v.

T. K. Jayalakshmi and another .. *Respondents (Plaintiff and 1st Defendant).*

Ramalinga Aiyar v. Jayalakshmi.

Civil Procedure Code (*V of* 1908), *S.* 20—*Wife's suit for maintenance and recovery of stridhan etc., against her husband and father-in-law—Place of suing—Common law rule that debtor should seek the creditor and pay him where he resided—Applicability—Contract Act, S.* 49.

The plaintiff's marriage took place at Negapatam and owing to ill-treatment by her husband at Vellore where they were residing she returned to her father's place at Palghat. Her father-in-law was residing at Mayavaram. She filed a suit in the Court of the Subordinate Judge, Palghat against her husband for maintenance and against her father-in-law for the return of her stridhanam properties alleged to have been entrusted to him at the time of marriage. On the question of jurisdiction, it was contended that the husband and father-in-law should be regarded as her debtors and in the absence of a contract to the contrary the English Common Law rule that the debtor must seek out the creditor applied and therefore the Palghat Court had jurisdiction.

Held, that the Palghat Court had no jurisdiction, because the cause of action for either the recovery of maintenance or for the re-delivery of the entrusted properties (return of which must have been contemplated at the family residence at Mayavaram or at the place where the husband resided) did not arise at Palghat; and neither of the defendants resided or worked there. The common law rule of the debtor seeking out the creditor cannot also be applied in the circumstances of the case.

Somiram Jeetmul v. R. D. Tata & Co. Ltd., (1927) 53 M.L.J. 25: L.R. 54 I.A. 265: I.L.R. 5 Rang. 451 (P.C.); *Raman Chettiar* v. *Gopalachari*, (1908) I.L.R. 31 Mad. 223 discussed.

Petition under S. 115 of Act V of 1908 praying that the High Court will be pleased to revise the finding of the Subor-

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* C. R. P. No. 162 of 1940. 13th March, 1941.

dinate Judge of South Malabar at Palghat dated the 6th December, 1939, and passed in Pauper O. S. No. 12 of 1939. Ramalinga Aiyar v. Jayalakshmi.

M. Ranganatha Sastri for Petitioner.

Ch. Raghava Rao for Respondents.

The Court delivered the following

JUDGMENTS. *The Chief Justice.*—The question which is involved in this petition is whether the Subordinate Judge of South Malabar sitting at Palghat was right in holding that he had jurisdiction to try a suit instituted by the first respondent against the petitioner and the second respondent. The petitioner is the husband of the first respondent and the son of the second respondent. The petitioner and his father are members of a joint Hindu family. The petitioner married the first respondent at Negapatam in the month of June, 1929. It is the first respondent's case that at the time of her marriage she entrusted her stridhanam property to the second respondent, who was to re-deliver it to her on demand. She alleges that the property entrusted to him consisted of Rs. 1,750 in cash and jewels, furniture and household utensils of the value of Rs. 3,352. The first respondent alleges that, while she was living with her husband at Vellore, where they went to reside after leaving Negapatam, his treatment of her was so cruel that she was compelled to leave him and return to her father's house at Palghat. At the time the suit was filed the petitioner was residing at Vellore in the North Arcot district and his father at Mayavaram in the Tanjore district. In filing the plaint in the Court of the Subordinate Judge of Palghat, the first respondent relied on the rule of English Common Law that the debtor must seek out his creditor and pay his debt where the creditor happens to reside, unless there is an arrangement to the contrary. She contended that both her husband, and her father-in-law were her debtors, the husband being indebted to her for monies in respect of her maintenance and her father-in-law in respect of the properties entrusted to him. So far as the husband is concerned her claim is for Rs. 3,400 for past maintenance and for future maintenance at the rate of Rs. 60 per mensem. The Subordinate Judge accepted the contention that the common law rule applies in this case and held that the Court had jurisdiction to try the suit. Leach, C.J.

S. 20 of the Code of Civil Procedure states, that, subject to the limitations contained in Ss. 16 to 19, every suit shall be

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instituted in a court within the local limits of whose jurisdiction (*a*) the defendant, or each of the defendants where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain; (*b*) any of the defendants, where there are more than one, at the time of the commencement of the suit actually and voluntarily resides, or carries on business, or personally works for gain, provided that the leave of the Court is given or the other defendants acquiesce in the suit being instituted there; or (*c*) the cause of action, wholly or in part, arises. It is quite clear that in this case the cause of action does not arise, even in part, at Palghat and neither of the defendants resides or works there. Therefore the order of the Subordinate Judge can only be supported if the defendants are to be regarded as debtors and the common law rule that the debtor is bound to seek out his creditor applies here. S. 49 of the Indian Contract Act states that, when a promise is to be performed without application by the promisee and no place is fixed for its performance, it is the duty of the promisor to apply to the promisee to appoint a reasonable place for the performance of the promise and to perform it at the place appointed. There is nothing in the Contract Act or in any other statute which states what is to be the position when the promisor fails to fulfil the duty imposed upon him by this section.

In *Raman Chettiar* v. *Gopalachari*[1] which is a case under the Code of 1882, a Bench of this Court held that the common law rule does not apply in India, but it has been argued that this decision has in effeet been overruled by the judgment of the Privy Council in *Soniram Jeetmul* v. *R. D. Tata and Co. Ltd.*[2] I do not read the judgment of the Judicial Committee as deciding that that rule can always be applied in India where there is no express stipulation with regard to the place of payment or no appointment of a place under S. 49 of the Contract Act. In delivering the judgment of the Board, Viscount Sumner, after referring to the decisions in *Motilal* v. *Surajmal*[3], *Dhunjisha Nusserwanji* v. *A. B. Fforde*[4], *Puttappa Manjaya* v. *Virabhadrappa*[5] and *Bansilal Abirchand* v. *Ghulam Mahbub Khan*[6]

1. (1908) I.L.R. 31 Mad. 223.
2. (1927) 53 M.L.J. 25: L.R. 54 I.A. 265: I.L.R. 5 Rang. 451 (P.C.).
3. (1904) I.L.R. 30 Bom. 167.
4. (1887) I.L.R. 11 Bom. 649.
5. (1905) 7 Bom. L.R. 993.
6. (1925) 49 M.L.J. 806: L.R. 53 I.A. 58: I.L.R. 53 Cal. 88.

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said:

"Their Lordships do not think that in this state of the authorities it is possible to accede to the present contention that S. 49 of the Indian Contract Act gets rid of inferences, that should justly be drawn from the terms of the contract itself or from the necessities of the case, involving in the obligation to pay the creditor the further obligation of finding the creditor so as to pay him".

It was not necessary in that case to decide whether the common law rule had full force in this country, because on examination of the terms of the contract the Privy Council considered that the suit had been instituted in the proper Court. But giving full weight to the words used in the passage which I have just quoted from the judgment, the judgment goes no further than saying that S. 49 does not preclude the application of the rule and does not get rid of inferences which should justly be drawn from the terms of the contract itself or from the necessities of the case. In the first place the terms of the contract are to be looked at and, if they do not help, the Court must have regard to the necessities of the case in deciding whether the rule should be applied.

Without considering in what cases the rule might be conveniently applied in India, it is, in my opinion, clear that it should not be applied in the present case. It has not been established that either the husband or the father-in-law is a debtor, but it may be assumed for purposes of this judgment that the husband is liable to pay the maintenance of the wife and that the father-in-law has possession of the properties described in the plaint. Taking the case of the husband, his liability, if any, does not arise out of contract. It arises, if at all, because he has maltreated his wife to such a degree that she cannot live with him any longer. The rule can have no application in such a case. Then, what is the position with regard to the father-in-law? The first respondent's claim here does arise out of an alleged contract, but it must have been within the contemplation of the parties that the repayment of the money and the re-delivery of the goods entrusted assuming there was entrustment should take place at the family house or at the house where the first respondent was residing with her husband. It could never have been in the contemplation of the parties at the time of the marriage (and that is when the entrustment is said to have taken place) that the husband would so illtreat his wife that she would be compelled to return to her father's house. I

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consider that in this case the Court can justly draw the inference that the parties contemplated repayment and re-delivery at the family house or at the husband's residence, and therefore the common law rule cannot be applied.

I would allow this petition with costs against the first respondent and direct that the plaint be returned to her so that she may file it in the proper Court.

Somayya, J.

Somayya, J.—While this case was argued before me when I was sitting as a single Judge it was urged that, in every case of a creditor and debtor, the Common Law Rule of England that the debtor should seek out the creditor and pay the debt where the creditor resides applies. It is in order to consider the validity of this argument that I posted this case before a Bench. If the Common Law Rule of England is to be invoked as a mere aid in finding out the place of performance of a contract I have no objection to its being so used and that is the way in which the Judicial Committre used it in *Soniram Jeetmul* v. *R. D. Tata & Co. Ltd.*,[1] but if it is argued that in every case of debtor and creditor, the rule is to be applied without considering either the terms of the contract or the circumstances attending on it or the necessities of the case I have no hesitation in rejecting the contention. The question whether the Common Law Rule of England is to be applied to a country of vast distances as India has to be considered with care, and it is not necessary to go into that question now.

I concur in the order passed by my Lord, the Chief Justice.

K. S. *Petition allowed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, MR. JUSTICE MOCKETT AND MR. JUSTICE KRISHNASWAMI AIYANGAR.

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Bhagavantulayya Dhora v. Venkandhora.

Donda Bhagavantulayya Dhora and others .. *Appellants** (*Respondents 7 to 11*)

v.

Adapa Venkandhora and others .. *Respondents* (*Appellant and Respondents 3 to 6*).

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1. (1927) 53 M.L.J. 25: L.R. 54 I.A. 265: I.L.R. 5 Rang. 451 (P.C.).

* L. P. A. No. 8 of 1940. 4th March, 1941.

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Bhagavantulayya Dhora v. Venkandhora.

Transfer of Property Act (IV of 1882), S. 84—Tender—Clause in mortgage deed to repay by a certain date—If precludes tender before that date—Refusal to accept a tender as premature—No objection taken to correctness of amount tendered—Mortgagee cannot later object to the correctness of the amount tendered—De minimis non curat lex *maxim, if can be applied to tender.*

Where by a mortgage deed of 10th September, 1926, the mortgagors covenanted to repay all principal and interest payable under the deed "*by* the 10th September, 1928", it means that it shall be payable "*on or before* the 10th September, 1928," and therefore a tender of the amount in June, 1927, of principal and interest then due is a valid tender.

Where by a *bona fide* miscalculation the tender fell short of the correct amount by Rs. 4 but the mortgagee refused to accept the tender not because the amount offered was short of what was then due by Rs. 4 but because he maintained that there could be no tender before September, 1928, he must be deemed to have waived the objection as to the correctness of the amount and he cannot later object to the validity of the tender on that ground. Also as there was here an unequivocal wrongful refusal to accept *a tender* the law does not require a tender to be made.

The question whether the maxim *de minimis non curat lex* can be applied to a tender left open.

Appeal preferred under Cl. 15 of the Letters Patent against the judgment and decree of the Hon'ble Mr. Justice Wadsworth in S. A. No. 93 of 1936 (A. S. No. 98 of 1934, Sub-Court, Vizagapatam) (O. S. No. 707 of 1932, District Munsif's Court, Chodavaram).

V. Govindarajachari for Appellants.

G. Chandrasekhara Sastri for Respondents.

The judgment of the Court was delivered by

Leach, C.J.

The Chief Justice.—This appeal involves two questions. The first question is whether the mortgagors of certain immovable properties were entitled to redeem the mortgage before the 10th September, 1928. The second question is whether a tender of Rs. 760 is to be regarded as invalid because it fell short of the amount due by Rs. 4. The mortgage was created by the first, second and third defendants in favour of Donda Godavarayya, the appellants' father, on the 10th September, 1926. The mortgagors covenanted to repay all the principal and interest payable under the deed 'by' the 10th September, 1928. In the month of June, 1927, the fourth defendant, who is now the first respondent, tendered to the mortgagee the sum of Rs. 760. The first respondent had purchased the equity of redemption and therefore stood in the shoes of the mortgagors. In tendering the sum of Rs. 760 the first respondent did so in the full belief that this was the correct amount. There had

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been a miscalculation, but this was not discovered at the time. The mortgagee refused to accept the tender, not because the amount offered was Rs. 4 short of what was then due under the mortgage, but because he maintained that the terms of the mortgage deed precluded the first respondent from making any tender until the 10th September, 1928. The mortgagee at no time questioned the correctness of the amount which was offered to him and a letter written by him to the first respondent on the 4th July, 1927, and his own testimony in the case clearly indicates an unequivocal refusal to accept anything less than an amount representing the principal and interest calculated up to the 10th September, 1928. It is not suggested that the first respondent in making the tender was unwilling to pay the full amount then due.

In 1933 the appellants' father instituted a suit in the Court of the District Munsif of Chodavaram to enforce payment of a sum of Rs. 1,700 which he claimed to be owing in respect of the mortgage. The defendants pleaded that by reason of the tender in the month of June, 1927, interest had ceased to run from the date of the tender and denied that there was anything more than Rs. 769 due which amount was deposited in Court. The District Munsif accepted the plea that there had been a valid tender and directed that the Rs. 769 should be paid to the plaintiff. Accordingly he dismissed with costs the claim for the balance of the Rs. 1,700. The appellants appealed to the Subordinate Judge of Vizagapatam, who held that the tender was invalid and passed a decree for the full amount claimed, less a small reduction in the amount of interest. The first respondent appealed to this Court and the appeal was allowed by Wadsworth, J., who restored the decree of the District Munsif. The present appeal is from the judgment of Wadsworth, J., under Cl. 15 of the Letters Patent.

The learned Judge held that the words "we shall pay all the principal and interest payable under this document by the 10th September, 1928" to be found in the deed meant payable 'on or before' that date, and we have no hesitation in concurring in this opinion. Before the learned Judge and in this Court several cases have been quoted, but none is really in point. The meaning of the word 'by' is not referred to in any of them. If the word 'by' is to be given here its ordinary meaning the document stipulates that the mortgagors shall pay on or before

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that date. The option was in them. In our opinion, it is not feasible to put any other interpretation on the word.

There has been considerable argument in this case on the question whether the maxim *de minimis non curat lex* applies to a tender. In *Subbai Goundan* v. *Palani Goundan*[1], Sadasiva Aiyar and Moore JJ., did not discuss the maxim, but impliedly rejected it. There a tender by a mortgagor to the mortgagee was short by 9 pies of the correct amount and it was held that this was a bad tender. In *Subramania Aiyar* v. *Narayanaswami Vandyar*[2], Seshagiri Aiyar, J., referred to the decision in *Subbai Goundan* v. *Palani Goundan*[1], and said that if he were deciding that case he would have applied the maxim, but this observation constituted an *obiter dictum* as the application of the maxim to a tender was not called for in that case. Venkataramana Rao, J., in *Narayanaswami Nayak* v. *Ramaswamy Nayak*[3], expressed his agreement with the observation of Seshagiri Aiyar, J., and this again was *obiter*. For reasons which will presently be indicated it is not necessary to decide whether the maxim can be applied to a tender of an amount in redemption of a mortgage, but in passing it may be observed that no case has been quoted to us, English or Indian, in which the maxim has been applied to a tender and it is certainly open to doubt whether it can properly be applied. S. 84 of the Transfer of Property Act which deals with a tender in redemption of a mortgage speaks of 'the amount', remaining due on the mortgage, and S. 38 (2) of the Contract Act says that an offer of performance should be made at a proper time and place, and under such circumstances that the person to whom it is made may have a reasonable opportunity of ascertaining that the person by whom it is made is able and willing there and then to do 'the whole' of what he is bound by his promise to do. It may also be observed that the sum of Rs. 4 is not an inappreciable sum.

The reason why it is not necessary to decide whether the maxim *de minimis non curat lex* applies in this case is because it is manifest that there are two other principles which apply and on these principles the judgment under appeal may be supported.

1. (1916) 30 M.L.J. 607. 2. (1917) 34 M.L.J. 439.
3. (1939) 1 M.L.J. 324.

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The first principle is that where there has been an unequivocal refusal to accept a tender the law does not require a tender to be made. In *Chalikani Venkatarayanim* v. *Zamindar of Tuni*[1], which was an appeal from this Court, the Privy Council expressly approved of the dictum of Vice-Chancellor Wigram in *Hunter* v. *Daniel*[2], where he said:

"The practice of the Court is not to require the party to make a formal tender where, as in this case from the facts stated in the bill, or, from the evidence, it appears that the tender would have been a mere form, and that the party to whom it was made would have refused to accept the money."

Chalikani Venkatarayanim v. *Zamindar of Tuni*[1], arose out of a mortgage suit, and the refusal to accept a tender was based on an invalid provision in the mortgage deed. In these circumstances and because it did not necessarily follow that if a tender had been made it would not have been accepted, the Judicial Committee held that there was not an unequivocal refusal. But the facts in that case are very different from the facts in this case. Here there was a tender and the appellants' father intimated in writing that he would not accept it. The refusal was embodied in a letter dated the 4th July, 1927, and it left no doubt that any tender less than the full amount calculated up to the 10th September, 1928 would not be accepted.

The second principle is that where there is a specific objection to a tender it is an implied waiver of any other objection there may be. The application of this principle is conveniently stated in Benjamin on Sale, 7th edition page 812 where the leading cases are collected. It will be sufficient if one of the cases is referred to, namely that of *Polglass* v. *Oliver*[3], where Bayley, B., said:

"To make a tender good, it should be made in the coin of the realm, and the money ought to be produced; but the party to whom the tender is made may make good what would otherwise be insufficient, by relying on a different objection. If he claim a larger amount, and give that as a reason for not accepting the money, he cannot afterwards object that the money was not produced nor can he object that it was offered in paper. If he object to accept the sum tendered because it is in paper, which he is not bound to receive, he gives the party tendering an opportunity to make his tender in coin; but if he puts his refusal upon a different ground, he waives the objection as to the quality of the tender."

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1. (1922) 44 M.L.J. 631: L.R. 50 I.A. 41: I.L.R. 46 Mad. 108 (P.C.).
2. (1845) 4 Hare 420: 67 S.R. 712.
3. (1831) 2 C. & J. 15: 37 R.R. 623: 149 E.R. 7.

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In the present case the tender was refused, not because the amount tendered was short by Rs. 4 but because the appellant considered that he was entitled to wait until the 10th September, 1928, which meant more in interest for him. His refusal of the tender on this ground waived any objection that he may have had to the amount being short. After he had written his letter of the 4th July, 1927, it was not open to him to raise the question of the amount of the tender or ask for the application of the *de minimis non curat lex* rule.

For these reasons the appeal will be dismissed with costs.

S. V. V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief* JUSTICE AND MR. JUSTICE HAPPELL.

Sri Raja Venkatadri Apparao Bahadur Zamindar Garu .. *Appellant** (*Defendant*)

v.

Timmaraju Venkata Kutumbarao .. *Respondent* (*Plaintiff*).

Venkatadri Apparao v. Venkata Kutumbarao

Civil Procedure Code (*V of* 1908), *O.* 21, *r.* 89—*Amount deposited without protest in an application under r.* 89 *by a claimant to save what he claimed to be his property—Payment if under coercion—Suit to recover—Maintainability—Contract Act* (*IX of* 1872), *S.* 72.

A suit by a person to recover the amount which he deposited in an application under O. 21, r. 89 of the Civil Procedure Code, on the ground that he was compelled to make the deposit in order to save what he claimed to be his property is maintainable. The payment made into Court by the plaintiff when he applied for an order to set aside the sale of his property in execution of a decree against someone else, though not made under protest must be considered to be a payment made under coercion within the meaning of S. 72 of the Contract Act.

Kotla Satyam v. *Thammana Perraju*, (1931) 34 L.W. 399, applied.

Krishna Aiyar v. *Arunachalam Chettiar*, (1935) 69 M.L.J. 349: I.L.R. 58 Mad. 972 (F.B.), distinguished.

Appeal under Cl. 15 of the Letters Patent against the judgment of the Hon'ble Mr. Justice King dated the 4th March, 1940, and made in S. A. No. 33 of 1937 preferred to the High Court against the decree of the Court of the Subordinate Judge of Bezwada in A. S. No. 107 of 1935 (O. S. No. 397 of 1933 District Munsif's Court, Bezwada).

Y. Govindarajulu and *B. Lakshminarayana* for Appellant.

M. S. Ramachandra Rao for Respondent.

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* L.P.A. No. 15 of 1940. 25th February, 1941.

Venkatadri Apparao v. Venkata Kutumbarao
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Leach, C.J.

The judgment of the Court was delivered by

The Chief Justice.—The appellant is the Zamindar of Vuyyur and was the defendant in the suit out of which this appeal arises. It was filed by the respondent to recover damages for an alleged wrongful attachment of his property. The trial Court (the Court of the District Munsif of Bezwada) decided against the respondent and dismissed the suit, but on appeal the Subordinate Judge of Bezwada reversed the decision of the District Munsif and granted the respondent a decree for Rs. 23-12-2. The appellant appealed to this Court, but his appeal was dismissed by King, J., who agreed with the judgment of the Subordinate Judge, but gave a certificate which permitted the filing of this appeal under Cl. 15 of the Letters Patent. The real question involved in this appeal is whether the case is governed by the decision of the Full Bench in *Krishna Aiyar* v. *Arunachalam Chettiar*[1], or by the judgment in *Kotla Satyam* v. *Thammana Perraju*[2], which was decided by a Division Bench. The learned Judge held that *Kotla Satyam* v. *Thammana Perraju*[2], applied.

Before referring to the authorities it will facilitate the appreciation of the argument if the facts in the present case are stated. In S. C. S. No. 200 of 1926 of the District Munsif's Court of Nuzvid at Bezwada the appellant sued for a decree against his tenant, Rangamma, for the rent owed by her in respect of Fasli 1332. He obtained a decree and on the 15th March, 1930, applied for the attachment of the land leased to Rangamma. The order of attachment was issued on the 16th July, 1930, but before this was obtained, to be exact, on the 16th June, 1930, Rangamma sold her tenant's interest to the respondent. On the passing of the order of attachment, the respondent applied to have it set aside, but his petition was dismissed and on the 8th December, 1930, the property was sold in execution proceedings. The respondent did not institute a suit to challenge the order passed on this application, but on the 5th January, he filed an application for the setting aside of the sale under O. 21, r. 89 of the Code of Civil Procedure and as he deposited the required amount the sale was set aside. Rangamma was also in arrears with her rent for Faslis 1333

1. (1935) 69 M.L.J. 349: I.L.R. 58 Mad. 972 (F.B.),
2. (1931) 34 L.W. 399.

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and 1334. To enforce payment the appellant filed S. C. S. No. 201 of 1926. He obtained a decree and an order of attachment in the subsequent execution proceedings. Notwithstanding his failure in the previous proceedings, the respondent applied for an order setting aside the attachment and on this occasion he was successful. The appellant did not challenge the validity of this finding by suit, as he could have done, and his failure to do so meant that the respondent's title was established.

We consider that the present case does not come within the judgment in *Krishna Aiyar* v. *Arunachalam Chettiar*[1]. The decision there was that once the proper amount has been deposited in Court on an application under O. 21, r. 89, made by a person entitled to present it, the Court has no power to entertain or proceed with the hearing of an application under r. 90, but must set the sale aside under r. 89. The Court observed that:

'. . . . the reported cases where claimants made payments to avert sales of property and the payments were therefore payments made under coercion are of no real assistance in this case'.

The Court was not considering a case like the present one where a person is suing to recover the amount which he deposited in an application under r. 89 on the ground that he was compelled to make the deposit in order to save what he claimed to be his property. In *Kotla Satyam* v. *Thammana Perraju*[2], it was held that a person, who, in order to get a sale set aside, filed an application under r. 89 and under protest made the required deposit was entitled to sue to recover the consideration for the sale on the ground that it was a payment made under coercion within the meaning of S. 72 of the Contract Act. The payment which the respondent made into Court when he applied for an order setting aside the sale of the 8th December, 1930, was not made under protest, but we consider that there was coercion within the meaning of S. 72. Unless he made the deposit, he could not get the sale set aside and the title to it would consequently vest in the appellant. In *Kanhayalal* v. *National Bank of India*[3], the Privy Council held that the word 'coercion' used in S. 72, is used in its general and ordinary sense as an English word and that its meaning is not controlled by

1. (1935) 69 M.L.J. 349: I.L.R. 58 Mad. 972 (F.B.).
2. (1931) 34 L.W. 399.
3. (1923) 45 M.L.J. 497: L.R. 50 I.A. 162: I.L.R. 4 Lah. 284 (P.C.).

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the definition in S. 15. A person who is compelled to make a payment in order to save his property being sold in circumstances such as we have here does not make the payment voluntarily but is subject to coercion within the meaning of S. 72 of the Contract Act.

For these reasons, we agree with the decision of King, J., and dismiss the appeal with costs.

K.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KING.

Vanguri Mahalakshmamma .. *Petitioner* (Appellant—Plaintiff.)*

v.

Vanguri Venkatanarayanamurthi (died) and others .. *Respondents (Respondents and Nil—Defendants and Nil).*

Mahalakshmamma v. Venkatanarayanamurthi.

Court-Fees Act (*VII of* 1870), *S.* 12 (1) *and* (2) *Scope—Appeal against dismissal of suit—Order for payment of additional court-fee on memorandum of appeal—Finality—Question of court-fee payable on plaint—Jurisdiction of appellate Court to reconsider.*

S. 12 (1) of the Court-Fees Act is intended to ensure that the Court at as early a stage as possible in the suit should *finally* determine the court-fee payable before the subject-matter of the suit itself is to be embarked upon; and in so determining there is no requirement that both parties to the suit must be heard, the matter being pre-eminently one between the Government and the party seeking relief.

A Court entertaining a memorandum of appeal has no jurisdiction to reconsider an earlier order determining the court-fee payable on the *memorandum of appeal* and pass a fresh order directing payment of additional court-fee on the ground that the mode of valuation of the relief adopted in the plaint was defective. Such an order if made will be opposed to the provisions of S. 12 (1) and is liable to be set aside in revision.

Lakshmana Aiyar v. *Palaniappa Chettiar,* (1935) 69 M.L.J. 479, *Sadasivam Pillai* v. *Varadaraja Odayar,* (1937) 1 M.L.J. 89 and *Chukka Durgiah* In re, (1938) 2 M.L.J. 647 followed.

But an appellate Court is not without jurisdiction under S. 12 (2) to reconsider an order already passed under that sub-section and direct payment of additional court-fee on *the plaint*; and any fresh order so passed cannot be challenged in revision under S. 115, Civil Procedure Code.

Petition under S. 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the Court of

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*C.R.P. No. 1120 of 1939. 28th January, 1941.

Mahalakshmamma v. Venkatanarayanamurthy.

the Subordinate Judge of Narsapur dated 27th June, 1939 and made in A. S. No. 41 of 1936 (O. S. No. 8 of 1933 on the file of the Court of the District Munsif of Tanuku).

M. Appa Rao for Petitioner.

T. Satyanarayana for Respondents.

The Court delivered the following

JUDGMENT.—The petitioner here filed a suit in the Court of the District Munsif of Tanuku for the division of property held by her husband's relations on the assertion that her husband died divided from them and that a release deed executed by him in their favour was not binding upon her. She sued also for cancellation of that release deed. Court-fee was paid in two sums, one for the general relief of the division and recovery of property and one for the cancellation of the release deed. The suit was dismissed on the ground that there was no division in status between the husband of the plaintiff and the other members of his family. In the course of the judgment a finding was given that the release deed was brought about by undue influence and was therefore not binding on the widow. This finding, as will be seen, had no material effect upon the result of the suit which had to be dismissed because the plaintiff's husband had died as a member of a joint family. The plaintiff appealed against the decree dismissing her suit and at first sought to pay court-fee only upon the main prayer in her suit for the recovery of her husband's estate. In an order dated 3rd March 1937, however, the learned Subordinate Judge of Narsapur called upon her to pay court-fee also upon the prayer in the plaint in the lower Court for cancellation of the release deed. That court-fee was paid on the 5th April, 1937. The appeal remained pending for another two years and came up for hearing in 1939. By that time a new Subordinate Judge had succeeded the Judge who had passed the order of March, 1937. The new Subordinate Judge once again discussed the question of court-fee and held that the method of valuation of the court-fee payable upon the relief for the cancellation of the release deed in the lower court was defective and that upon the true method of valuation further court-fee was payable. An order was therefore passed on the 27th June, 1939 that the plaintiff should pay Rs. 405 deficit court-fee on the plaint and Rs. 405 deficit court-fee upon the memorandum of appeal. It is

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against that order that the present revision petition has been filed.

This petition will have to be decided upon a consideration of S. 12 of the Court-Fees Act. S. 12 runs as follows:

"(i) Every question relating to valuation for the purpose of determining the amount of any fee chargeable under this chapter on a plaint or memorandum of appeal shall be decided by the Court in which such plaint or memorandum, as the case may be, is filed, and such decision shall be final as between the parties to the suit.

(ii) But whenever any such suit comes before a Court of appeal, reference or revision, if such Court considers that the said question has been wrongly decided to the detriment of the revenue, it shall require the party by whom such fee has been paid to pay so much additional fee as would have been payable had the question been rightly decided, and the provisions of S, 10, paragraph ii, shall apply".

It will at once be apparent that the learned Subordinate Judge's order falls into two portions, one of which purports to be under S. 12 (1) and the other under S. 12 (2). So far as the memorandum of appeal is concerned, the learned Judge is acting under S. 12 (1). So far as the plaint is concerned the learned judge is acting as a Court of appeal under S. 12 (2). There is nothing in S. 12 (2) which states that a Court may not reconsider an order which it has already passed under that sub-section. It seems to me therefore that it cannot be successfully argued that that part of the learned Subordinate Judge's order which calls upon the appellant to pay a deficit court-fee on the plaint is without jurisdiction. As this is a revision petition under S. 115 of the Civil Procedure Code, I can see no ground for interference with that part of the learned Subordinate Judge's order.

With regard to the order calling for an additional payment on the memorandum of appeal, it seems to me that it is contrary to the provisions of S. 12 (1). S. 12 (1) lays it down that the Court which entertains a memorandum of appeal shall decide what is the correct court-fee to be paid upon it and that decision shall be final as between the parties to the appeal. It is argued that, if a decision is to be final, it means that the same Court cannot reconsider its own decision. This has been held in three cases which have been brought to my attention, all in recent years by Venkatasubba Rao J., in *Lakshmana Aiyar* v. *Palaniappa Chettiar*[1], Venkataramana Rao J., in *Sadasivam*

1. (1935) 69 M.L.J. 479.

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Pillai v. *Varadaraja Odayar*[1] and Pandrang Row, J., in *Chukka Durgiah* In re[2]. It is argued for the respondents here that S. 12 (1) makes final only a decision which has been finally arrived at by the Court after both parties have been heard and that the phrase "shall be final as between the parties to the suit" would be meaningless unless this were the true interpretation of the word 'decision'. I am not able to accept this argument. It seems to me that it would have been very easy for the Legislature to have laid it down that no final decision on a question of court-fee shall be given unless both parties are heard if that had been the intention of the Legislature. The word 'decided' and the word 'decision' are here given without any qualifications at all and they must clearly apply to any adjudication by the Court whether both parties have been heard or only one party has been heard or even if no party at all has been heard. The only essential is that the Court should apply its mind to the questions at issue in arriving at the true calculation of the court-fee; so that, although in this case the first order of the 3rd March, 1937 was passed after hearing only the appellant and not the respondent, I can still see no reason why that order can be excluded from the term 'decision' in this sub-section. The order is quoted in the later order of June 1939 and it is an order obviously passed after the Court had applied its mind to the question of the amount of court-fee payable. Nor do I see on general principles any reason why the Legislature should have required that both parties should be heard before a decision as to court-fee could be given. Questions of court-fee are not questions between the parties to a suit. The subject-matter of their litigation has nothing to do with court-fee. It is pre-eminently a matter between the Government and the subject, a matter for the safeguarding of which the Court of course must be the final authority, I am not prepared to hold that the Legislature at any time contemplated that this question of court-fee should form the subject-matter of an issue to be tried along with the other issues when the suit came up for adjudication. This has been also stated by Venkatasubba Rao, J., in the judgment[3] already referred to. He says at page 482:—

"Under the prevailing usage, the Court fully goes into the question relating to the court-fee, only upon an objection taken in the written statement by the defendant; but, as the Judicial Committee points out in *Rachappa*

1. (1937) 1 M.L.J. 89. 2. (1938) 2 M.L.J. 647.
3. (1935) 69 M.L.J. 479.

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Subrao v. *Shidappa Venkatrao*[1], the Court-Fees Act was passed not to arm a litigant with a weapon of technicality against his opponent, and from that view it follows that, although in actual practice a defendant is permitted to object that the proper court-fee has not been paid, he has, strictly speaking, no legal right to raise such a plea, but his function must be deemed to be, subject to the Court's leave, merely to assist it in coming to a proper decision".

I am of opinion that the real purpose for which this sub-section was enacted was to ensure that the Court at as early a stage as possible in the suit should finally determine what was the amount of court-fee payable before the subject-matter of the suit itself was to be embarked upon, and that once the Court did so determine, the parties were not to be permitted to raise the question again before it. I therefore with respect follow the authorities already quoted and hold that this part of the order of the learned Subordinate Judge calling upon the petitioner to pay Rs. 405 upon the memorandum of appeal has been passed in direct contradiction of the provisions of S. 12 (1) of the Court-Fees Act and therefore without jurisdiction. I accordingly set aside that part of the order and, as already mentioned, affirm the other portion of the order relating to the deficit court-fee on the plaint. Each party to this petition will bear his own costs.

K. C. *Order varied.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice,* MR. JUSTICE MOCKETT AND MR. JUSTICE KRISHNASWAMI AIYANGAR.

Mir Ghulam Hussain Sahib ... *Appellant** (*Appellant*)

v.

Ayesha Bibi and others ... *Respondents* (*Respondents*).

F.B.

Mir Ghulam Hussain Sahib v. Ayesha Bibi.

Letters Patent, Cl. 15—Leave to appeal—Certificate—If can be restricted to particular points only—Guardians and Wards Act (VIII of 1890), S. 30—Court guardian selling minors' property without permission of Court—Sale whether void—Suit to set aside sale when maintainable by the ward—Limitation Act (IX of 1908), Art. 44.

In granting a certificate for leave to appeal under Cl. 15 of the Letters Patent it is not open to a Judge to limit the points fit for appeal and it is for

1. (1918) 36 M.L.J. 437: L.R. 46 I.A. 24: I.L.R. 43 Bom. 507.

* L. P. A. No. 14 of 1940. 18th February, 1941.

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the Court hearing the Letters Patent appeal to say what questions it will allow to be raised.

Where a person had been appointed under the Guardians and Wards Act to be the guardian of the property of Muhammadan minors an alienation by him of properties without obtaining the Court's permission would be voidable and not void and would operate as a valid transfer unless set aside at the instance of the minor or minors concerned.

Decision in *Rahima Bi* v. *Abdul Vakil Sahib and others*, A. S. No. 526 of 1931, (unreported) overruled.

Where a transfer is made by a *de facto* guardian the position may be different.

Appeal under Cl. 15 of the Letters Patent against the judgment and decree of the Hon'ble Mr. Justice Horwill dated the 1st March, 1940, and passed in S. A. No. 303 of 1937 preferred against the decree of the Court of the Subordinate Judge of Trichinopoly in A.S. No. 40 of 1936 preferred against the decree of the Court of the District Munsif of Trichinopoly in O. S. No. 109 of 1933.

D. Ramaswami Aiyangar for Appellant.

S. Panchapagesa Sastri for *T. V. Ramanatha Aiyar* for Respondents.

The Court delivered the following

Leach, C.J.

JUDGMENTS: *The Chief Justice.*—The seventh respondent is the mother of the eighth, ninth and tenth respondents in this appeal and of the sixth defendant in the suit out of which the appeal arises. The sixth defendant died pending the litigation and is now represented by the eleventh, twelfth and thirteenth respondents. The father, one Shumsudeen, died before 1922. In that year, the seventh respondent was appointed the guardian of the properties of her sons and daughters all of whom were minors. On the 24th of September, 1924, the seventh respondent, acting on her own behalf and as guardian of the ninth and tenth respondents and the sixth defendant, sold to the appellant a house which had been left by Shumsudeen. The eighth respondent was at this time a major and she joined in the conveyance. The seventh respondent did not obtain the sanction of the Court to the sale, as she was bound to do by reason of S. 29 of the Guardians and Wards Act, 1890. Her failure to obtain the necessary consent of the Court did not, however, avoid the transaction so far as the minors were concerned. The transaction was not void, but merely voidable. S. 30 says that the disposal of the immovable property by a guardian in contravention of S. 28 or S. 29 is voidable at the instance of any person

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affected thereby, and goes no further. Art. 44 of the Limitation Act gives a ward three years from the date when he attains majority to sue to set aside a transfer of property made by his guardian. Therefore the minors were placed by statute in a position to sue to set aside the transaction within three years of attaining majority, but failure to exercise this right would make the appellant's title unassailable.

On the 31st of January, 1932, the ninth and tenth respondents and the sixth defendant sold their shares in the property to one Mohamed Ghulam Hussain Sahib, who, on the 24th of January, 1933, filed, the suit out of which this appeal arises to recover from the appellant the shares of his vendors in the property. Mohamed Ghulam Hussain Sahib died during the pendency of the suit and his legal representatives, who are respondents 1 to 6 were made plaintiffs in his place. The suit was defended by the appellant, who contended that the sale was valid and that the suit was barred by limitation in that it had been filed three years after the ninth and tenth respondents and the sixth defendant had attained majority. The District Munsif of Trichinopoly who tried the suit held that (1) the vendors of Mohamed Ghulam Hussain Sahib were not bound by the sale to the appellant of the 24th of September, because the Court's sanction had not been obtained for the transfer; (2) the ninth respondent alone had attained majority more than three years before the suit; and (3) the ninth and tenth respondents were majors at the time of the sale to Mohamed Ghulam Hussain Sahib, but that the sixth defendant was a minor. Relying on a decision of this Court (Ramesam and Cornish, JJ.), in the unreported case of *Rahima Bi* v. *Abdul Vakil Sahib and others*[1], the District Munsif held that the plaintiffs were entitled to a decree for the shares of the ninth and tenth respondents and the sixth defendant. The appellant appealed to the Subordinate Judge of Trichinopoly, who concurred in the judgment of the District Munsif and accordingly dismissed the appeal. Before the Subordinate Judge, the appellant applied to amend his grounds of appeal by setting out the contention that in any event the trial Court erred in giving the plaintiffs a decree for the share of the sixth defendant as she was a minor at the time of the sale and consequently could not

1. A. S. No. 526 of 1931.

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transfer her interest to the vendee, Mohamed Ghulam Hussain Sahib. The Subordinate Judge refused to allow this additional ground to be raised. The appellant then appealed to this Court. The appeal was heard by Horwill, J., who also was bound by the decision of this Court in *Rahima Bi* v. *Abdul Vakil Sahib*[1]. The learned Judge indicated that he was not in agreement with that judgment but being bound by it he was compelled to follow it. The learned Judge held that the Subordinate Judge was justified in not allowing the appellant to raise the contention with regard to the sixth defendant's inability to confer any title on the vendee, and in giving the certificate under Cl. 15 of the Letters Patent, which has permitted of the present appeal he limited it to the question whether the case was governed by *Rahima Bi* v. *Abdul Vakil Sahib*[1]. The appellant, while conceding that that case did bind the Courts below, says that it is bad law. He also challenges the validity of the certificate granted by Horwill J., in that it limited his grounds of appeal. He says that as a certificate was granted he is at liberty to say that the Subordinate Judge and Horwill, J., erred in refusing to allow him to raise the question of the effect of the sixth defendant's minority at the time of the sale to Mohamed Ghulam Hussain Sahib.

It will be convenient to deal first of all with the contention that the learned Judge was wrong in attempting to limit his certificate. I consider that the appellant's objection is well founded. Cl. 15 of the Letters Patent permits of an appeal from a single Judge of this Court sitting on the appellate side, where the Judge declares that "the case is a fit one for appeal". It is no function of the learned Judge to say what points are fit for appeal. It is for him to say whether 'the case' is a fit one for appeal. If he considers that it is, he can give the certificate, but he must leave the matter there. It is for the higher appellate Court to say what are the questions it will allow to be raised. It follows that in my opinion it is open to the Court to hear and decide the appellant's objection with regard to the course taken below in respect of the contention which the appellant raised regarding the sixth defendant's capacity to contract.

In my judgment, the appellant's objection that *Rahima Bi* v. *Abdul Vakil Sahib and others*[1] was wrongly decided is also well founded. In that case, as in the one now before us, a

1. A. S. No. 526 of 1931.

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person had been appointed under the Guardians and Wards Act to be the guardian of the property of Mohamedan minors. The guardian applied for permission to Court to sell certain properties and permission was given subject to a condition which was not fulfilled. The question was whether in those circumstances the sale was a valid one. Ramesam, J., who delivered the judgment of the Bench after observing,

> "Whereas in the case of a sale by a *de jure* guardian or a sale by a Court guardian who has obtained the permission of the Court and who has complied with the conditions precedent to the sale, if any, the sale is presumed to be *prima facie* valid and the quondam minor has to sue to set aside the sale and therefore Art. 44 will become applicable",

went on to say:

> ". . . . but if the case is of a sale by a *de facto* guardian or by a Court guardian without obtaining sanction or without complying with the conditions precedent imposed by the Court granting sanction, then the minor is not bound to set aside the sale".

These two statements are in conflict and the second statement ignores altogether the provisions of S. 30 of the Guardians and Wards Act. While the statement that an unlawful sale by a *de facto* guardian does not bind the minors can be taken to be correct so far as a guardian of a Mohamedan minor is concerned, it is certainly not the case where a guardian, appointed by the Court under the Guardians and Wards Act, has conveyed property without the sanction of the Court. As I have already observed, the transaction is voidable and not void and operates as a valid transfer unless set aside at the instance of the minor or minors concerned within the period allowed by the law of limitation. The decision of Ramesam and Cornish, JJ., not only runs directly contrary to unambiguous words of the statute, it ignores three decisions of this Court which were binding upon the learned Judges, namely, *Sinnayya Pillai* v. *Munisami Iyan*[1], *Periakaruppan Chetty* v. *Kandasami Chetty*[2] and *Sivanmalai Goundan* v. *Arunachalam Goundan*[3]. I fail to understand the reference made to a sale which is '*prima facie* valid', because the statute leaves no doubt that a transfer made by a lawful guardian without sanction of the Court is valid until it is set aside. The decision in *Rahima Bi* v. *Abdul Vakil Sahib*[4] cannot be allowed to stand in so far as it relates to transfers made by guardians appointed by the Court. Where

1. (1899) 9 M.L.J. 64: I.L.R. 22 Mad. 289.
2. 1933 M.W.N. 791.
3. (1938) 2 M.L.J. 428.
4. A.S. No. 526 of 1931.

the transfer is made by a *de facto* guardian the position may be very different. Therefore, I would allow this objection and hold that the suit is barred by limitation so far as the interest of the ninth respondent is concerned. It is not barred so far as the interest of the tenth respondent is concerned because the suit was filed within three years of the date on which he attained majority and Mohamed Ghulam Hussain Sahib obtained a valid transfer of his interest in the property.

It remains to decide the appellant's contention that he should have been allowed to have raised his objection with regard to the passing of the sixth defendant's interest. I consider that inasmuch as the evidence on which the plaintiffs relied showed conclusively that the sixth defendant was a minor when she purported to sell her interest to Mohamed Ghulam Hussain Sahib on the 31st of January, 1932, the appellant should have been allowed to amend his memorandum of appeal and the Court should have dealt with this additional objection. It is true that the appellant did not raise this contention in his written statement and the evidence on which he was relying was adduced in order to establish the contention that the sixth defendant was a major, but the plaintiffs succeeded in negativing this evidence and establishing that the sixth defendant was a minor. In these circumstances, the appellant was entitled to say to the Court that even on the plaintiffs' own evidence, they are not entitled to a decree for the sixth defendant's interest. But instead of allowing the contention to be raised, the Subordinate Judge gave a decree to the plaintiffs in respect of property to which they themselves had shown that they had no title. It would be manifestly wrong to give the plaintiffs a decree for property in respect of which they clearly have no title, and consequently, I would allow this further objection.

The result is that the appeal succeeds so far as it concerns the interest of the ninth respondent and the sixth defendant. Therefore the decree will be amended by limiting it to the interest of the tenth respondent. The appellant is entitled to his costs before the Subordinate Judge, Horwill, J., and in this Court; he will also get his costs in the trial Court proportionate to the value of the interests of the ninth respondent and the sixth defendant. The plaintiffs-respondents will get costs in the trial Court based on the value of the tenth respondent's interest in the property. They will have no costs beyond this.

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Mockett, J.

The case will be remanded to the trial Court to pass a final decree for partition based on this judgment.

Mockett, J.—I entirely agree. As we are overruling a judgment of a Bench of this Court, I desire to note a certain aspect of the judgment of the Bench which I find it difficult to follow. S. 29 of the Guardians and Wards Act provides for the alienation of minor's property by his guardian and sets out the circumstances under which it may or may not be alienated. It may not, without the previous permission of the Court, be mortgaged, charged or transferred and there is a restriction on leases. S. 31 gives the Court power to attach to the acts mentioned in S. 29 a number of conditions, if the Court thinks fit. It is obvious from a reading of S. 30 that a disposal of immovable property in contravention of S. 29 read if necessary with S. 31, which the Act enables 'any other person affected' to attack is valid unless held to be otherwise. Ramesam, J., has stated thus:

> "Whereas in the case of a sale by a *de jure* guardian or a sale by a Court guardian who has obtained the permission of the Court and who has complied with the conditions precedent to the sale, if any, the sale is presumed to be *prima facie* valid and the quondam minor has to sue to set aside the sale and therefore Art. 44 will become applicable."

In other words, the learned Judge envisages a suit *e.g.*, by a minor attacking the transfer by a lawful guardian who has in every way complied with all the conditions which the Court has set out. Exactly what sort of suit that is, I find it difficult to understand unless it relates to a transfer obtained by fraud under a cloak of lawful authority. The suit which the Act does envisage, *e.g.*, in the case of a sale by a Court guardian without obtaining sanction or without complying with conditions precedent which has to be set aside under S. 30 and to which Art. 44 applies the learned Judge expressly says need not be instituted for a period of twelve years and then not for an order setting aside the sale but under Art. 144, Limitation Act, for possession. I have merely set out this distinction in the judgment to lend emphasis to my respectful dissent from it.

Krishnaswami Aiyangar, J.

Krishnaswami Aiyangar, J.—I agree with the judgment of my Lord, the Chief Justice and have nothing further to add.

K. C. *Appeal allowed in part and case remanded.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE ABDUR RAHMAN.

Subbayyan Chettiar and another ... *Appellants** (*Plaintiffs*)

v.

T. R. Ponnuchami Chettiar ... *Respondent* (*1st Defendant*).

Subbayyan Chettiar *v.* Ponnuchami Chettiar.

Deed—Construction—Settlement deed—Properties given to wife for her maintenance for life—Death of settlor—Subsequent unchastity—If involves divestiture of life estate—Question as to correctness of recitals in the deed or its validity—Burden of proof.

By a settlement properties were given by the settlor to his wife "to live in and enjoy for her maintenance". It was established that she had become unchaste after the lifetime of her husband and it was contended that the life estate was forfeited by her on account of misconduct.

Held, that in the absence of any *dum casta* clause in the settlement deed under which the property had come to vest in the wife for her life, no forfeiture can be found to have been incurred by her on the ground of her subsequent unchastity.

Held further, that the burden of proving that recitals in a settlement deed are not correct and that the deed is invalid for want of consideration, is on the persons who allege that the deed is not binding on them. *Muthuswami Goundan* v. *Palani Goundan*, (1927) 53 M.L.J. 763, relied on.

A person who wants an agreement or a conveyance to be declared invalid on account of its being opposed to public policy has to prove the grounds which would bring it under S. 23, Indian Contract Act.

Appeal against the decree of the Court of the Subordinate Judge of Dindigul in A. S. No. 65 of 1936 preferred against the decree of the Court of the District Munsif of Periakulam in O. S. No. 611 of 1934.

B. Sitarama Rao for Appellants.

K. Narasimha Aiyangar for Respondent.

The Court delivered the following

JUDGMENT.—Kamayan Chetti suspected the fidelity of his first wife. He had two sons by her. These are the plaintiffs in the suit out of which this appeal arises. He married a second wife Alagammal, but did not have any children or expect to get any by her. He married a third one, Veerammal by name, some time in 1919. She is the second defendant in the present litigation. A settlement deed was executed by Kamayan Chetti on the 15th April, 1919, (Ex. 1-a). Under this deed he settled some property on his second wife, some on the third and some on the third wife's father Ramalingam Chetti. The deed

* S. A. No. 225 of 1938. 29th October, 1940.

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contains the following recital:

"As per agreement entered into at the time of the said marriage between the said third wife Veerammal, the aforesaid person No. 3, Ramalinga Chetti, the father of the said person Veerammal and myself, the third wife, Veerammal shall during her life live in and enjoy for her maintenance the *B* schedule properties out of the undermentioned properties worth Rs.1,500; the second wife Alagammal shall during her life enjoy for her maintenance the *A* schedule properties, and the aforesaid Ramalinga Chetti shall look after the aforesaid properties in the *A* and *B* schedules. If a male-child is born to any one of the second and third wives, individual No. 3 Ramalinga Chetti shall, as remuneration for his labours enjoy the dry land bearing Survey No. 1610, Letter *A*, having an extent of one acre and 7 cents and dry land bearing Letter *B*, the said Survey Number having an extent of one acre and seven cents, making in all two acres and fourteen cents of dry land in the aforesaid properties mentioned in the schedule. The remaining properties in the *A* and *B* schedule shall be enjoyed by the male children to be born hereafter. If no issue is born to the second or third wife, after their life (lives) and that of mine, the aforesaid Ramalinga Chetty shall get the entire property in the *A* and *B* schedules and enjoy them. I shall live by turns for one year with each of the second and third wives, look after their affairs and get on with my livelihood. If they do not properly feed and maintain me or live amicably with me, I shall take out Rs. 500 from the properties in the *A* and *B* schedules for the said maintenance".

Veerammal incurred certain debts and first defendant obtained a decree against her. In execution her interest in the properties given to her under the above stated deed of settlement was attached. The plaintiffs and their father Kamayan Chetti objected to the attachment. The execution Court held that the transfer under the settlement deed was not binding on the plaintiffs. Their objections were consequently accepted to the extent of their two thirds share on the 30th June, 1933 (Ex. E). The father's petition was, however, dismissed in regard to his share. The decree-holder made a default subsequently and the execution was dismissed with the result that the attachment effected on his application was raised. Kamayan died on the 3rd July, 1933. Another application for execution (E. P. No. 1793 of 1933) was presented after his death by the decree-holder, but in view of what had happened in the objections raised by the plaintiffs and their father to the earlier attachment, the decree-holder only asked for the attachment of Kamayan's one third share in the property this time. An objection was put in against this attachment on behalf of the plaintiffs but it was rejected on the ground that the matter had been already decided in June 1933 (Ex. B.). This led to the institution of the present suit with the object of getting the

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claim order Ex. B vacated and a declaration to the effect that the properties attached by the first defendant were not liable to be sold in the execution of his decree granted to the plaintiffs. They alleged in their plaint that the deed of settlement was a gift in fact and did not for that reason bind them. It was also attacked on the ground of the second defendant's unchastity in consequence of which the grant in her favour, it was urged, should be held to have been, as it was for her maintenance, forfeited. The plaintiffs mentioned other grounds for the invalidity of the deed of settlement also but being questions of fact, the decision in regard to those has become final and has not been questioned before me in this appeal. The suit was decreed by the District Munsif of Periakulam but his judgment was reversed by the learned Subordinate Judge of Dindigul on appeal and the suit was ordered to be dismissed. Aggrieved by that judgment and decree the plaintiffs have come up to this Court in second appeal.

The first question to decide in this appeal relates to the validity of the deed Ex. 1-a. Learned counsel for the appellant contends in the first instance that there was no evidence on the record to show that there was an ante-nuptial arrangement between his client's father Kamayan Chetti and the second defendant, in consideration of which this document could have been executed in her favour. Since the alienation was by the plaintiff's father and was only maintained by the execution Court in June, 1933 to the extent of his one-third share, it was not disputed that it would be binding on the plaintiffs if it were found to be for a valid consideration. Nor was it, in view of the Full Bench decision in *Madam Pillai* v. *Badrakali Ammal*[1] disputed that the bargain 'to receive the land' by the second defendant 'in discharge of the claim to future maintenance' would not be for an illegal or invalid consideration; but it was urged by learned counsel for the appellants that the burden of proof in respect of such an agreement would be on the party who asserted it and that the recital in the deed would not, in so far as his clients were not parties to the same, shift the onus to them. Had the plaintiffs not been defeated in the execution Court and had they not brought this suit to get the order passed by the execution Court vacated, there might have been some justification for this contention. But having regard to the decision of the

1. (1922) 42 M.L.J. 410: I.L.R. 45 Mad. 612 (F.B.).

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execution Court disallowing their objection, it was for them to establish that the agreement executed by their father was invalid. It is true that the execution Court had not decided the objections raised by the plaintiffs after Kamayan's death, on the merits; but this was because they had been heard and decided by that Court in June, 1933, and it was not necessary that they should be considered in the same manner once again. The position would not have been very different if the Court had passed the order against the plaintiffs not on account of the previous decision but on account of the objections having been designedly or unnecessarily delayed. Such an order would have been although not passed on the merits, conclusive against the party against whom it was made unless he sued to get it set aside within one year and succeeded in getting a decree to that effect. The terms in which O. 21, r. 63, Civil Procedure Code, is couched seem to leave no doubt on that point. When it is incumbent upon a defeated claimant to bring a suit, the onus of proving that his claim should not have been dismissed would obviously lie on him. And this he can only discharge by proving the allegations which he asserts to secure the relief prayed for by him. It is for him, within the words of r. 63 to 'establish the right which he claims to the property in dispute'. The plaintiffs alleged in this case that the deed of settlement was invalid for want of consideration or in other words that there was no ante-nuptial agreement. It was therefore for them to establish that this was so. Reliance was placed by Mr. Sitarama Rao on a decision of their Lordships in *V. E. A. R. M. Firm* v. *Maung Ba Kyin*[1], but it was explained by me in *Mahomed Kassim Sahib* v. *Subramanian Chettiar*[2], when I, sitting with my esteemed brother Venkataramana Rao, J., drew attention to the observations which fell from their Lordships during the course of arguments in that appeal. The facts of the Privy Council decision have been given in a somewhat cryptic manner and, unless they are closely examined, one is liable to be led astray. It is quite sufficient to say that it does not support the contention advanced on behalf of the appellants. Nor is it possible to accept the contention put forward by learned counsel for the appellants that the recitals in the deed Ex. 1-a would not bind his clients as they were not parties

1. (1927) I.L.R. 5 Rang. 852.

2. (1940) 51 L.W. 34.

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to the document. It might have been otherwise if they were claiming their own shares but they are not doing so. Their shares were released in June, 1933. The claim in the present suit is in respect of their father's share; and to that extent at least, whether they are suing as heirs or as co-parceners, they would be bound, *prima facie* anyhow, by the recital in the deed. In either case it was incumbent on the plaintiffs to prove that there was no ante-nuptial agreement and the statement by their father in the deed was not correct; or in other words that the deed of settlement was really a deed of gift and was not binding on them. There is no evidence on the record on this point, and the plaintiffs must consequently fail. The observations in *Muthusami Goundan* v. *Palani Goundan*[1], support the view in regard to onus which I have taken. I would therefore agree with the lower appellate Court that the plaintiffs have failed to establish that the deed, Ex. 1-a was invalid for want of consideration.

The property was stated in Ex. 1-a to have been given to the second defendant to 'live in and enjoy for her maintenance.' Since it was established that she had become unchaste after the lifetime of her husband, the second contention put forward by learned counsel for the plaintiffs was to the effect that the life estate must be taken to have been forfeited by her on account of her misconduct and she would not have been entitled to retain the property that was given to her by her husband for the purpose of her maintenance. Reliance was placed in support of this contention on the decisions in *Nagamma* v. *Virabhadra*[2], *Lakshmichand* v. *Anandi*[3], *Muhammad Muin-ud-din* v. *Jamal Fatima*[4] and *Sita Devi* v. *Gopal Saran Narayan Singh*[5]. The right of a Hindu widow to maintenance is conditional upon her leading a life of chastity. Unchastity on her part would disentitle her to any maintenance at least until such time that she did not mend her conduct and return to better ways; but the question to be decided here is different. It cannot be disputed that the property mentioned in Ex. 1-a had on its execution, come to vest in her. The question to decide is if she should be held to have been divested of the same on account of her subsequent unchastity. The cases on which reliance was placed by

1. (1927) 53 M.L.J. 763.
2. (1894) I.L.R. 17 Mad. 392.
3. (1935) 69 M.L.J. 380: L.R. 62 I.A. 250: I.L.R. 57 All. 672 (P.C.).
4. (1921) I.L.R. 43 All. 650.
5. A.I.R. 1928 Pat. 375.

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learned counsel for the appellant are authorities for the general proposition but do not touch the real question that arises in this case for decision. There is no suggestion even, not to say proof, that the second defendant was unchaste at the time when she came to hold the life estate under Ex. 1-a or even during her husband's life time. Had she been proved to have been unchaste at the time when the estate was going to be vested in her, her unchastity would have prevented it from doing so. But she has been found to be unchaste only after the death of her husband. It would therefore follow that she was in possession of the property given to her by the deed Ex. 1-a for as long as her husband lived after its execution and even for sometime after his death. Can she be held then to be divested of that property on the ground of her immoral conduct after his death? The answer to that question must be in the negative. It was held by their Lordships in *Moniram Kolita* v. *Kerry Kolitany*[1] that a 'widow, who not having been degraded or deprived of caste had inherited the estate of her deceased husband,' would not be 'liable to forfeit that estate by reason of subsequent acts of unchastity'. In the face of this authority it is impossible to contend otherwise. The decisions cited by learned counsel for the respondent *Parami* v. *Mahadevi*[2] and *Bommaya Hegade* v. *Srinivasa Hebbara*[3] although to some extent relevant to show that the principle enunciated by their Lordships in *Moniram Kolita* v. *Kerry Kolitany*[1] was perhaps borne by the learned Judges when deciding those cases in mind, do not carry me any further. I would agree with the learned Subordinate Judge and hold that in the absence of any *dum casta* clause in the deed Ex. 1 (a) under which the estate had come to vest in the second defendant for her life, no forfeiture can be found to have been incurred by her on the ground of her subsequent unchastity.

The third and the last contention raised by learned counsel for the appellant was that the deed of settlement should be held to be void as the grant to the said second defendant's father Ramalinga was—being in consideration of his giving his daughter in marriage—immoral and opposed to public policy under S. 23 of the Indian Contract Act and if a portion of the deed Ex. I (a) was found to be invalid or void, the remaining

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1. (1880) L.R. 7 I.A. 115: I.L.R. 5 Cal. 776 (P.C.).
2. (1909) I.L.R. 34 Bom. 278. 3. (1914) 27 M.L.J. 305.

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portions of the deed of settlement would have to share the same fate under the principles contained in S. 24 of the Indian Contract Act. The objection on behalf of the respondent that the transaction was carried out in this case was met by the plea that Kamayan's estoppel would not bind his sons the present plaintiffs and that any property being joint family property could be sued for and recovered by them if it was found to have been conveyed under a deed which is found to be void. It was also urged on behalf of the appellants that the onus to establish that the transaction was a valid one would be on the alienee or one who was supporting her cause and it would be for the defendants to establish that the alienation was for a valid consideration and therefore binding on the family. Since a Hindu co-parcener's right in Madras has been held to be transferable merely on equitable grounds, it was contended that any transfer without a legal or for an insufficient consideration must be held to be invalid.

I have in an earlier portion of this judgment determined the question of onus and I see no reason to change that view even if the contention is, as it has been, put more plausibly. It is really the same contention as was advanced before although clothed in a different garb this time. A person who asks an agreement or a conveyance to be declared invalid, on account of its being opposed to public policy has to prove the grounds which would bring it under S. 23 Indian Contract Act. The apparent tenor of the document is against this contention.

The contention in regard to the invalidity of the deed Ex. 1 (a) on the ground of its being against public policy and hence wholly void was not raised either in the pleadings or before the lower appellate Court. It was not even mentioned in the grounds of appeal taken on behalf of the appellants in this Court. Their learned counsel does not dispute these facts but contends that the point raised by him is purely one of law and he is entitled to do so even at the hearing of this appeal. Reliance was placed by him in this connection on the decision in *Alice Mary Hill* v. *William Clarke*[1] where following certain English decisions it was held by a learned Judge of the Allahabad High Court that when the consideration for a contract which is asked to be enforced is found by a Court to be either

1. (1904) I.L.R. 27 All. 266.

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wholly or in part unlawful, such Court is bound to take notice of that fact and give effect to the same, notwithstanding that the contract appeared on the face of it to be legal or that the unlawfulness of the consideration therefor was never pleaded by the defendant. No exception can be taken to the statement of the law as contained in this decision; but the point to determine is whether the objection taken by learned counsel for the appellant raises a pure question of law or a mixed question of law and fact. No party can be allowed to spring surprises on his opponent in a Court of law and it would be tantamount to springing a surprise, if it were possible for the respondent to show that he could have pleaded and proved something that would have met the appellant's contention but cannot do so as the objection is being raised in appeal. The whole of the argument advanced by Mr. Sitarama Rao, learned counsel for the appellants, on the question of illegality of Ex. 1-a assumes that the alienation to Ramalingam Chetti was in consideration of his daughter's marriage. There is nothing in the deed which would lead me to infer this beyond any reasonable doubt. There is a mention of the agreement with Ramalinga having been arrived at in the deed at the time when the marriage contract between his daughter Virammal and Kamayan Chetti was entered into, but this does not necessarily show that the two contracts were really parts of the same transaction. It is quite possible that the two agreements between these three parties were separate and independent and did not constitute to be two terms of the contract of marriage although the fact that they were entered into at or about the same time does give rise to a certain amount of suspicion that they might have been inter-dependent. But there is no evidence or even a suggestion on the record that the agreement with Ramalinga formed a consideration for the agreement of his daughter's marriage with Kamayan Chetti and this was presupposed by learned counsel for the appellant as a basis for his arguments. Mr. Venkatachari on behalf of the respondent urged—and I am inclined to agree with him—that, if this question had been raised on behalf of the plaintiffs in the trial Court, it would have been open to his client to show that the grant was really made in favour of Ramalinga Chetti for the services that he was called upon to render in regard to the management of Kamayan Chetti's property. There is a reference to that fact in the deed itself. In

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view of these facts I am of opinion that the contention raised by learned counsel for the appellants is one of mixed law and fact and should not be permitted to be raised at this stage.

It is unnecessary in these circumstances to consider what the decision would have been if it were found that the conveyance to Ramalinga Chetti was made in consideration of his daughter's marriage and not on account of any other duties to be rendered by him. Learned counsel for the respondent contended that this case would have to be, in view of the facts that it was a completed conveyance and executed even according to the plaintiff for an illegality or immorality which had been already committed, governed by the principle on which the cases in *Mt. Mahtab-un-nissa* v. *Rifaqat Ullah*[1], *Ram Sumran Prasad* v. *Gobind Das*[2] and *Nanjundaswami Chetti* v. *Kanagaraju Chetti*[3], were decided. But having regard to what I have said before, it does not appear to be necessary to go into this question now. For the above reasons the appeal fails and is dismissed with costs.

(Leave to appeal is refused).

K. S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, AND MR. JUSTICE HAPPELL.

Kausalai Ammal .. *Appellant** (*Respondent—Transferee decree-holder*).

v.

Sankaramuthiah Pillai .. *Respondent* (*Appellant—Plaintiff*).

Kausalai Ammal v. Sankaramuthiah Pillai.

Transfer of Property Act (IV of 1882), Ss.3 and 39—Maintenance decree-holder—Charge created on immoveable properties—Same properties mortgaged to another—No wilful abstention or gross negligence on the part of the mortgagee—Priority of mortgage over the charge—'Notice'—Meaning of—Amendment of definition in 1929—If applicable retrospectively.

Where the widow of a member of a joint Hindu family obtained a decree of Court which created a charge on certain immoveable properties of the joint family for her maintenance, but the same properties had been mortgaged shortly before to the respondent without any intention to defeat the widow and for a necessary family purpose, in the absence of any wilful abstention or gross negligence on the part of the mortgagee to make inquiries the mortgage would stand and take priority over the maintenance claim of the widow.

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1. A.I.R. 1925 All. 474. 2. (1926) I.L.R 5 Pat. 646.
3. (1918) 36 M.L.J. 242: I.L.R 42 Mad. 154.

* L. P. A. No. 26 of 1939. 11th December, 1940.

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The mortgagee in 1926 could not, merely because the Transfer of Property Act was amended in 1929, be required to do more than he was required to do under the law as it stood when the property was mortgaged to him.

The omission to make inquiries is not to be regarded as sufficient to constitute constructive notice in the case within the meaning of S. 3.

Appeal under Cl. 15 of the Letters Patent from the judgment of the Hon'ble Mr. Justice Krishnaswami Aiyangar dated the 24th January, 1939, and passed in S. A. No. 643 of 1935 preferred against the decree of the Court of the Subordinate Judge of Cuddalore in A. S. No. 43 of 1934 preferred against the decree of the Court of the District Munsif of Cuddalore in O. S. No. 789 of 1931.

A. S. Nataraja Aiyar for Appellant.

K. R. Rangaswami Aiyangar for Respondent.

The judgment of the Court was delivered by

Leach, C.J.

The Chief Justice.—The appellant is the widow of a person who was a member of a joint Hindu family. Her husband died some time before 1926, but the actual date does not appear in the record. On the 18th October, 1926, the appellant filed a suit to recover from Murugesam Pillai, the surviving member of the joint Hindu family, money by way of maintenance. She succeeded and the Court made the sums awarded to her under the decree a charge on certain immovable properties. On the 25th July, 1926, Murugesam Pillai mortgaged these properties to the respondent, who in 1931 filed in the Court of the District Munsif of Cuddalore the suit out of which this appeal arises to enforce the mortgage. The appellant was made a party and she pleaded that her charge for maintenance took priority of the respondent's mortgage. The District Munsif and the Subordinate Judge of Cuddalore on appeal upheld the appellant's contention, but the respondent appealed to this Court and Krishnaswami Aiyangar, J., allowed his appeal. This appeal has been filed under Cl. 15 of the Letters Patent, Krishnaswami Aiyangar, J., having given the necessary certificate.

Stated shortly the appellant's case is that the respondent was placed on inquiry whether a Hindu widow had a claim on the properties, and as he failed to make any inquiries he is postponed to the appellant. S. 39 of the Transfer of Property Act, as it stood at the time of the mortgage, read as follows:

"Where a third person has a right to receive maintenance or a provision for advancement or marriage, from the profits of immovable property, and such property is transferred with the intention of defeating such right, the

right may be enforced against the transferee if he has notice of such intention or if the tranfer is gratuitous; but not against a transferee for consideration and without notice of the right, nor against such property in his hands."

Therefore, under this section in order that a transferee should be postponed to a person entitled to maintenance or a provision for advancement or marriage the transfer had to be made with the intention of defeating the right and the transferee had to have notice unless he accepted the transfer without giving consideration.

In 1929 the section was amended to read as follows:

" Where a third person has a right to receive maintenance or a provision for advancement or marriage from the profits of immovable property, and such property is transferred the right may be enforced against the transferee, if he has notice thereof or if the transfer is gratuitous; but not against a transferee for consideration and without notice of the right, nor against such property in his hands."

It is said by the learned advocate for the appellant that the section as amended has retrospective effect. It is not necessary to embark upon a discussion of this question, because it is obvious that the respondent could not by reason of the amendment be required to do more than he was required to do by the law as it stood when the property was mortgaged to him.

In 1926 the definition of notice given in S. 3 of the Transfer of Property Act read as follows:

" A person is said to have notice of a fact when he actually knows that fact or when, but for wilful abstention from an inquiry or search which he ought to have made, or gross negligence, he would have known it, or when information of the fact is given to or obtained by his agent under the circumstances mentioned in the Indian Contract Act, 1872, S. 229."

Krishnaswami Aiyangar, J., considered that the use of the word "wilful" in the definition made it clear that the abstention from inquiry should be designed, and due to a desire to avoid an inquiry which would lead him to ultimate knowledge, and that an omission to make inquiries was not to be regarded as sufficient to constitute constructive notice within the meaning of the section. The learned Judge pointed out that no authority dealing with S. 39 had been quoted to him, and no authority has been quoted to us, but there is support for his interpretation of the word "wilful", and I agree with him that in this case the omission to make inquiries is not to be regarded as sufficient to constitute constructive notice within the meaning of the section. In *Joshua* v. *Alliance Bank of Simla*[1], the Calcutta High Court

1. (1894) I.L.R. 22 Cal. 185 (F.B.).

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held that the words "wilful abstention from an inquiry or search" must be taken to mean such abstention from inquiry or search as would show want of *bona fides*, and no reason has been suggested why the word "wilful" should be construed in a different sense here. It has been accepted that the mortgage was a genuine transaction and that the consideration passed. There has been no suggestion that the mortgage was created in order to defeat the appellant. It has in fact been assumed by the learned advocate for the appellant that the mortgage was created for a necessary purpose, namely a purpose which would be necessary from the point of view of the members of a joint Hindu family. However the case is looked at it is obvious that there has been no wilful abstention or gross negligence on the part of the respondent, and in these circumstances the mortgage which was created in his favour stands. Consequently it must take priority of the appellant's charge.

For these reasons the appeal fails and will be dismissed with costs.

K. C. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Ordinary Original Civil Jurisdiction.)

PRESENT—MR. JUSTICE VENKATARAMANA RAO.

[*In the matter of* The Indian Companies Act VII of 1913
and
In the matter of The Travancore National & Quilon Bank, Ltd., (in liquidation). S. Barkat Ali and others—Petitioners.]

G. Samuel ... *Petitioner**

v.

Cyril Gill & John Stanley Goodwin, Official Liquidators ... *Applicant.*

Samuel v. Cyril Gill.

Companies Act (VII of 1913), S. 229—Set-off—Loan advanced by Bank—Security offered by third party having Fixed Deposit Receipt in Bank—Option given to Bank to set-off loan as against fixed deposit—Liquidation of Bank—Right of debtor to plead set-off.

The Travancore National and Quilon Bank Ltd., lent a sum of money to the applicant on a promissory note, and in respect of the said loan one *S* gave the amount covered by a Fixed Deposit Receipt in her favour as security. *S* stated that she gave the said security on the definite understanding that the

* O. P. No. 158 of 1938 3rd May, 1940.
Application No. 2204 of 1939.

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Bank should adjust the amount due by the applicant from and out of the money due to her under the deposit at the time of maturity and consented to a set-off being allowed. By her letter she had authorised the Bank to set-off at any time the whole or any portion of the deposit and interest accrued thereon towards the said loan whenever the Bank might deem it necessary. The Bank having gone into liquidation the applicant sought to set-off the amount due by him as against the amount payable to *S* under the Fixed Deposit Receipt

Held, that there being no agreement permitting the applicant to claim a set-off of the debt due to him the plea of set-off was not sustainable.

Held however, that in equity the Court could direct the Bank to adjust the dividend payable under the deposit towards the amount due and recover only the balance.

Ellis & Co.'s Trustee v. *Dixon-Johnson*, (1925) A.C. 489 and *Mani Aiyar* v. *Official Liquidator of Travancore National Bank Subsidiary Company Ltd.*, (1939) 2 M.L.J. 325, referred to.

Official Assignee v. *M. C. Harikrishna & Sons*, A.I.R. 1935 Rang. 201, distinguished.

S. Parthasarathy and *V. K. Thiruvenkatachari* for Petitioner.

K. R. Vepa for Creditor.

G. Ramakrishna Aiyar and *C. M. J. Ernest* for Applicant.

C. Krishnaswami Aiyar instructed by *King* and *Partridge* for Official Liquidators.

The Court passed the following

ORDER.—This application raises a question of set-off. The Travancore National and Quilon Bank hereinafter called the Bank, lent a sum of Rs. 2,000 to the applicant herein, Mr. G. Samuel, on a promissory note dated 7th October, 1936. The Bank was not willing to lend this sum to him without security. His mother-in-law Mrs. G. P. Sathanantham Srinivasan offered to give the necessary security. On the date of the loan she had a sum of Rs. 4,300 in fixed desposit covered by the Fixed Deposit Receipt bearing the same date. She gave that amount as security. In her affidavit Mrs. Srinivasan states that she gave the said security on the definite understanding that the Bank should adjust the amount due by Mr. Samuel from and out of the money due to her under the said deposit at the time of maturity. The terms on which she gave the said security were reduced to writing and is evidenced by a letter written by Mrs. Srinivasan to the Bank and it runs thus:

"I beg to hand you herewith Fixed Deposit amount Receipt No. 116 for Rs. 4,300 dated 7th October, 1936, as security for the pronote loan of Rs. 2,000 you have granted to Mr. G. Samuel. I hereby authorise you to set-off at any time the whole or any portion of the said deposit and interest accrued thereon towards the said loan whenever you deem it necessary."

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It appears from the affidavit of the Official Liquidators that along with the said letter a duly receipted Fixed Deposit Receipt in blank was also lodged with the Bank. The Fixed Deposit was for a period of two years and on the date when the Bank went into liquidation it had not matured. Mr. Samuel has not paid anything towards the promissory note but he claims that he is entitled to have the amount due by the Bank to Mrs. Srinivasan set-off against the amount due by him. Mrs. Srinivasan has also filed an affidavit stating that she is willing to have the amount set-off. The question is not whether she is willing, but whether a set-off can be allowed in law. Mrs. Srinivasan has not personally undertaken to repay the debt except giving security as aforesaid. There are no mutual dealings in this case which would entitle the applicant to claim a set-off under S. 229 of the Indian Companies Act, under which in the winding up of an insolvent company the same rules should prevail and be observed as are in force for the time being under the law of insolvency with respect to the estates of persons adjudged insolvent.

Mr. G. Ramakrishna Aiyar who appears for the applicant has not been able to put before me any authority in support of the contention that he can claim a set-off under the said section. His contention however is that Mrs. Srinivasan was a surety for Samuel though her liability is limited to the extent of her security and a surety can claim to have the debt due to her by the Bank set-off against the debt due by the principal. In support of this contention he relied on a ruling of my learned brother Gentle, J., in Application Nos. 841 and 815 of 1939. In that case both the principal and the surety were severally liable to pay the debt due to the bankrupt creditor. Therefore the learned Judge following the rule that if a surety being severally liable has money in the hands of the creditor who became a bankrupt, he was entitled before the trustee sues the principal to have the amount applied in satisfaction of the debt. To put it concretely, *A*, owes a debt to *B*, *B*, owes a debt to *C*, *C* also agrees to stand surety for *A*, and becomes liable in respect of *A's* debt; *C* is entitled to have the amount due to him set-off against the amount due from the debtor and in respect whereof he is liable. The reason is there is a demand by *A*, against *C*, and there is a cross demand by *C*, against *A*. In this case the Bank cannot call upon Mrs. Srinivasan to pay the debt; all that

they are entitled to is to realise the security and pay themselves off. I do not see how the said decision of my learned brother Gentle, J., supports him. Samuel v. Cyril Gill.

Mr. Ramakrishna Aiyar then contends that an agreement to set-off was entered into by the Bank at the time of the contract and the said agreement is binding on the Bank. He also raises another contention, namely, the Bank by reason of having gone into liquidation has impaired the security and is not in a position to return the security unimpaired on payment of the debt by Mr. Samuel and the Bank is therefore not entitled to enforce the debt; in any event, it must give credit for the full value of the security. In opposition to this contention, the counsel for the Official Liquidators relies on the decision of my learned brother Gentle, J., reported in *Mani Aiyar* v. *Official Liquidator of Travancore National Bank Subsidiary Company Ltd.*,[1] Ex parte *Caldicott*, In re *Hart*[2] and *Commercial Bank of Australia* v. *Official Assignee of the Estate of John Wilson & Company*[3]. The case decided by Gentle, J., appears to be a case in point. In that case the applicant was a subscriber for one ticket in a chit fund conducted by the Travancore National (Subsidiary) Company and was a successful bidder for a sum of Rs. 940 at the auction held. Under the Rules of the Company he could only draw the amount of Rs. 940 on giving sufficient security for the due payment of the future instalments of the chit. Two of the brothers of the subscriber who were also subscribers to other chit funds conducted by the company offered to give the amount that might be due to them in respect of their tickets in the said chit funds as security for the amount that might be due in respect of future instalments if defaults were committed by their brother. The learned Judge held that no set-off could be allowed. He distinguished two cases on which reliance was placed and held they were not applicable to the facts of that case. One was a case reported in *Ellis and Co.'s Trustee* v. *Dixon-Johnson*[4] and the other, a decision of Leach, J., (now my Lord the Chief Justice) in *Official Assignee* v. *M. C. Harikrishna & Sons*[5]. As Mr. Ramakrishna Aiyar laid considerable emphasis on these two cases, I shall proceed to deal with them. In *Ellis and Co's Trustee* v. *Dixon-Johnson*[4] as pointed

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1. (1939) 2 M.L.J. 325.
2. (1884) 25 Ch. D. 716.
3. (1893) A.C. 181.
4. (1925) A.C. 489.
5. A.I.R. 1935 Rang. 201.

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out by Viscount Cave no question of a cross claim or set-off really arose. The question that actually arose there was whether the defendant, who was indebted to the bankrupt firm and deposited certain rubber shares with them as security, was not entitled to a return of the said shares in specie on making a payment. It arose in this way. Before the firm became bankrupt, the firm sold the said shares without the knowledge or authority of the defendant who was not aware of such a sale till the bankruptcy. The trustee in bankruptcy claimed the balance of the debt due from the defendant after giving credit to the value of the shares. Lawrence, J., before whom the matter came up was of the opinion that the bankrupt firm was guilty of wrongful conversion and that "the principle that a mortgagee will not be permitted to sue his mortgagor for the mortgage debt, if he has parted with the mortgaged property otherwise than in exercise of a power of sale" would apply to the case. But the principle is not inflexible and some modification was required in the circumstances of that case. He was of the opinion that justice could be done in that case by ascertaining the market value of the shares on the date of the receiving order and by setting off the amount so ascertained against the amount found due from the defendant and the balance directed to be paid by the defendant. When the matter went up before the House of Lords, Viscount Cave, L. C., was of the opinion that bankruptcy could not modify the application of the rule that if a creditor holding security sues for his debt, he is under an obligation on payment of the debt to hand over the security, and if, having improperly made away with the security, he is unable to return it to his debtor, he cannot have judgment for the debt. However he was not prepared to disturb the order made by Lawrence, J., but he was emphatically of the opinion that there was no mutual credit within the meaning of S. 31 of the Bankruptcy Act and he gave his reason thus. "The right of the defendant was not to a money payment present or future, but to a return of his shares in specie as and when he paid off his debt". It is thus clear that there is no question of a set-off in that case. Mr. Ramakrishna Aiyar contends that the principle of that case ought to be applied to the present case on the ground that the Bank was unable to return the security by reason of the liquidation and in support of his contention he relied on the ruling of the Rangoon High

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Court reported in *Official Assignee* v. *M.C. Harikrishna & Sons*[1]. The rule as stated by Viscount Cave L,C., is applicable to a case where a mortgagee or a pledgee has improperly made away with the security. There is no question here of the Bank improperly making away with the security or its inability to return it. The moment the debt is paid, it will release its security. The contention is, not that the security cannot be had but the value of the security has been diminished by the conduct of the Bank. It seems to me that the rule of Viscount Cave, L.C., will not be applicable to cases of liquidation or insolvency. The security in this case takes the form of a debt due by the Bank. If that debt was owing to the debtor it will be a case of cross-demand and a case for a set-off. But the security in this case was given by a third party and by reason of the liquidation the owner of the security cannot have any cause of action against the Bank for any wrongful conversion. Under the law he cannot say that the value of his debt is impaired: he is only entitled to receive the dividend and cannot claim the full amount. While therefore the owner of the security cannot claim the full amount and there can be no cause of action against the Bank for any diminution in the value of the security, it is not possible to understand how the applicant can claim the full value of the security. No doubt the view of Mr. Ramakrishna Aiyar derives some support in the ruling of the Rangoon High Court, but that case is distinguishable. In that case there was a joint debt by a firm of partners. As security for the payment of the debt one of the partners gave his Fixed Deposit amount with a stipulation that that amount should be adjusted against the debt. On the facts the learned Judge found there was an agreement between all the parties that there should be a set-off of this amount against the debt due by the firm. The learned Judge was very clear in stating that there was no question of mutual dealings within the meaning of the Bankruptcy Act. Apart from agreement it may perhaps be possible to justify the conclusion of the learned Judge on the ground that having regard to the fact that one of the partners was severally liable for the debt a set-off is permissible: No doubt the learned Judge rested his decision on *Ellis & Co's Trustee* v. *Dixon-Johnson*[2]. With due respect I am unable to

1. A.I.R. 1935 Rang. 201.
2. 1925 A.C 489.

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agree in the reasoning of the learned Judge in regard to this.

Mr. Ramakrishna Aiyar next contends that on the facts it must be found in this case that there was an agreement to set-off the amount of Fixed Deposit against the debt due by the applicant. From the terms of the letter given by Mrs. Srinivasan the Bank is authorised to set-off the whole or any portion of the said deposit and interest accrued thereon. Of course it confers a right on the Bank to set-off, if the Bank so chose to do. From the terms of the letter it appears to me that the Fixed Deposit amount is given as security with the intention that the amount when realised may be appropriated by the Bank towards the debt if they so chose to do. It is one thing to say that the Bank has a right to set-off but another thing to say that the applicant has got a right to set-off and there was an agreement to set-off. It is open to the Bank to give up the security if they like.

I am therefore of the opinion that no set-off can be allowed in this case but the equity of the case demands that the Bank should adjust the dividend payable under the deposit towards the amount due and recover only the balance. In the circumstances I do not direct the applicant to pay the costs of the Official Liquidators. I award Rs. 35 as and for costs of the Official Liquidators plus Rs. 35 for their counsel, Rs. 35 for Mr. Parthasarathy, counsel for the Petitioning Creditor and Rs. 35 for Mr. Vepa, the costs to come out of the assets of the Bank.

B. V. V. *Application dismissed.*

Panchayat Board, Razole v. Sait Amichand Dungarmal Firm.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE BURN.

The Panchayat Board, Razole by its President. *Petitioner** (*Defendant*)

v.

Sait Amichand Dungarmal Firm represented by Sait Anjarimal and others. *Respondents* (*Plaintiffs*).

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*C. R. P. Nos. 572 to 582 of 1938. 6th November, 1940.

Panchayat Board, Razole *v.* Sait Amichand Dungarmal Firm.

The Madras Local Boards Act (XIV of 1920), Ss. 225 and 228—Suit for refund of tax paid on ground that provisions of Act were not complied with—Assessees submitting returns—President classifying assessees in a class other than that to which they should be assigned as per the return—No evidence that President considered the returns—Suit if barred by S. 228—Effect of r. 11-A of Sch. IV—Suit more than six months after cause of action—If barred by limitation under S. 225.

Certain persons were assessed to profession-tax on a classification made by the President of a Panchayat Board which was not in accordance with the returns made by them. On notices being served on them to submit returns of income, the plaintiffs duly submitted their returns as required by r. 11-A sub-r. (1) of Schedule IV of the Madras Local Boards Act. Some of the plaintiffs also submitted income-tax demand notices. There was no evidence to indicate that the President was satisfied that any of these returns was incorrect or incomplete. The assessees paid the tax and filed the suit for refund of the same more than six months after the assessment.

Held, that the suits were not barred by S. 228 (2) of the Madras Local Boards Act. The burden is on the Panchayat Board to show that the provisions of the Act with regard to assessment have been in substance and effect complied with. Merely because the President did not accept the returns but made his own assignments of classes to these persons for the purpose of profession-tax, it cannot be deemed that he was satisfied that the returns were incorrect or incomplete. Further in cases where income-tax demand notices are submitted, they ought to be accepted as conclusive for the purpose of classification under the Explanation to r. 11-A.

The failure of the Board to take notice of account books produced with the appeal does not by itself amount to substantial non-compliance with the provisions of the Act as there is no procedure laid down for disposal of appeals. Government Order No. 691 seems to be in the nature of an advice to the Local Boards as to the disposal of appeals, and is not shown to have the force of law.

A suit for refund of house tax collected on the ground that the levy was illegal does not fall within the scope of S. 225 of the Local Boards Act. The suits are not barred by limitation.

Petitions under S. 25 of Act IX of 1887 praying that the High Court will be pleased to revise the decrees of the Court of the District Munsif of Razole in S.C.S. No. 628 of 1936 etc.

V. Viyanna for Petitioner.

P. Satyanarayana Rao and *V. Parthasarathy* for Respondents.

The Court delivered the following

JUDGMENT.—These revision petitions are brought from the decisions of the learned District Munsif of Razole in S. C. S. Nos. 625 etc., of 1937. The suits were filed by the respondents, residents within the limits of the Union Panchayat of Razole for the refund of sums of money collected from them in the shape of profession-tax. The learned District Munsif decreed the suits and the Panchayat Board has preferred these revision petitions.

Panchayat Board, Razole v. Sait Amichand Dungarmal Firm.

The Panchayat Board alleged three main reasons why the suits should be dismissed. The first was a plea that the suits were barred by limitation under S. 225 of the Madras Local Boards Act, since they had been brought more than six months after the date on which the cause of action arose. The second was that payments had been made voluntarily and therefore the sums paid could not be recovered and the third was that the suits were barred by S. 228 (2) of the Local Boards Act.

Mr. Viyanna for the petitioning Board has drawn my attention to the decision of the Full Bench in *Panchayat Board, Tiruvottiyur* v. *Western India Matches Co*[1]. After that decision it is no longer possible for Mr. Viyanna to contend that the suits were barred by limitation under S. 225 of the Local Boards Act. Mr. Viyanna has also not argued the second point, namely, that the payments were made voluntarily. He has devoted his argument to the question arising under S. 228 (2). That provision is as follows:

> "No suit shall be brought in any Court to recover any sum of money collected under the authority of this Act or to recover damages on account of any assessment or collection of money made under the said authority provided that the provisions of this Act have been in substance and effect complied with."

Here the allegations were that the assessment of the plaintiffs to profession-tax had been made arbitrarily and unjustly and incorrectly. That being so, the burden was upon the Panchayat Board to show that the provisions of the Act had been in substance and effect complied with. The learned District Munsif has written a very long judgment and in some parts it is not quite clear, but his finding is (at the end of his judgment in paragraph 26) that:

> ". . . . . the defendant Board has not complied with the provisions of the Act in substance and effect in levying profession-tax on the plaintiff firms or in disposing of their appeals."

Mr. Viyanna has attempted to show that the learned District Munsif has misconceived his proper function and that he has discussed the question whether the assessments were correct rather than the question whether the assessments have been correctly made. It is with regard to this point that the judgment of the learned District Munsif is not at all times quite clear; but there is, I think, sufficient indication in the record that the procedure prescribed for assessing persons to profession-tax was not substantially complied with in these

1. (1939) 1 M.L.J. 588: I.L.R. 1939 Mad. 566 (F.B.).

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cases. For this purpose the most important rule that needs to be considered is r. 11-A in Schedule IV appended to the Local Boards Act. Under the first part of this rule the company or person upon whom a notice has been served is at liberty to submit a return showing the income derived during the half-year for which profession-tax is claimed or for the corresponding half-year of the previous year, and by sub-S. (2) it is provided that if such a return is made and if the president is satisfied that it is correct and complete, the president shall levy the profession-tax from the company or person on the basis of such return. It is further provided in the Explanation to sub-S. (2) that if the company or person produces the notice of demand of income-tax served upon it or him, the president shall be bound to take one-half of the income mentioned in the notice as the income derived from the sources on which profession-tax is leviable for the purpose of levying profession-tax. By sub-S. (3) it is laid down that if no return is made as required under sub-r. (1) or if the president is satisfied that any return so made is incorrect or incomplete, the president shall assign to the company or person the class in the scale appropriate to the half-yearly income of such company or person as estimated by him, and sub-S. (4) enacts how the president may arrive at the estimate for the purpose of such classification.

In these cases it is not disputed that returns were submitted by all the plaintiffs as required under sub-r. (1) of r. 11-A. No evidence was produced from the Panchayat Board to indicate that the President was satisfied that any of these returns was incorrect or incomplete. No evidence was produced to show that the president, when he assigned a certain classification to each of these plaintiffs guided himself by the considerations pointed out in sub-r. (4) of r. 11-A. In some instances moreover income-tax demand notices were submitted which under the Explanation already quoted ought to have been accepted as conclusive for the purpose of classification. Mr. Viyanna can only suggest that since the president did not accept the returns but made his own assignments of classes to these plaintiffs for the purpose of profession-tax, he must be deemed or presumed to have been satisfied that the returns were incorrect or incomplete. I do not think this can fairly be inferred. Since the president gave no reasons of any kind for the assessments

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which he made and since he made no reference to the accounts or income-tax demand notices submitted, it seems much more probable that the president took no notice of the provisions of r. 11-A of Schedule IV. It cannot in any case I think be said that the Board proved that the provisions of r. 11-A have been in substance and in effect complied with.

The plaintiffs also made objections to the manner in which their appeals had been disposed of. They alleged that with their appeals they had also produced their accounts and that no notice had been taken of their accounts. This contention appears to have been correct in fact, but by itself this would not, I think, suffice to show that the provisions of the Act had not been substantially complied with. The rules with regard to appeals to Panchayat Boards are rr. 28, 29, 30 and 31 in Schedule IV to the Local Boards Act. In these rules no procedure is laid down for the disposal of appeals. Learned counsel for the respondents agrees with the learned District Munsif in referring to a Government Order No. 691 which appears to have been published in the Gazette of July, the 4th, 1924. There was not, however, any proof on the side of the plaintiffs that this Government Order was authoritative in the sense that it was passed by the Government in the exercise of any rule-making power conferred upon them by the provisions of the Local Boards Act. Its terms read rather more like advice to local boards as to the disposal of appeals. I am not satisfied therefore that this Government Order has been shown to have the force of law.

For the reasons already indicated I think the decision of the learned District Munsif in these cases is in accordance with law. These petitions must therefore be dismissed with costs—one Vakil's fee for the batch Rs. 150.

S.V.V. *Petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

Parambath Kanaran v. Vasudevan.

Parambath Kanaran and others .. *Petitioners** (*Accused—Respondents*)

v.

C. R. Vasudevan .. *Respondent* (*Complainant—Petitioner*).

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* Cr. R. C. No. 1084 of 1940 (Cr. R. P. No. 1029 of 1940). 10th February, 1941.

Parambath Kanaran v. Vasudevan.

Criminal Procedure Code (V of 1898), S. 552—Lawful marriage alleged—Girl taken away by parents—Order of Magistrate to produce the girl—Grounds necessary for such an order.

Where a girl was alleged to have been legally married to the complainant but taken away by her parents against her wishes to her home with the intention of getting her married to somebody else and the Magistrate issued a notice under S. 552, Criminal Procedure Code to the parents to produce the girl,

Held, that the Magistrate should have had something more substantial before him about the alleged marriage than the complainant's statement for ordering the production of the person of the girl. Moreover an order under S. 552 could be passed only if the girl was under 16 years of age which was not the case here.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying that the High Court will be pleased to revise the order of the Chief Presidency Magistrate of the Court of Presidency Magistrates, Egmore, Madras, dated 1st November, 1940, and made in M. P. No. 946 of 1940.

K. K. Sreedharan for Petitioner.

R. Karunakara Menon for Respondent.

The Crown Prosecutor for the Crown.

The Court passed the following

ORDER.—The respondent put in an application in the Court of the Chief Presidency Magistrate purporting to be under S. 552 of the Code of Criminal Procedure alleging that he was lawfully married to the third petitioner here on the 22nd September, 1940, that the nuptials took place, and that on the following day, the 23rd day of September, 1940, the parents, the first and second petitioners here, took away the third petitioner against her wishes to her home and detained her there with the intention of getting her married to somebody else.

The Magistrate issued a notice under S. 552 of the Code of Criminal Procedure to produce the girl. On the date to which the case had been adjourned an advocate appeared on behalf of the petitioners and represented that it would be a great hardship to bring the girl all the way from Tellicherry in North Malabar to Madras to answer to a petition that could not in any case be granted, because the girl was more than 16 years of age and no offence had been committed within the jurisdiction of the Magistrate. The Magistrate overruled that objection and ordered a non-bailable warrant to issue. Upon the representation of the advocate appearing for the petitioners here that it was illegal to have the girl arrested and that, in any case, it would be a very harsh method of procuring her attend-

ance in Court, the order was cancelled after the advocate gave an undertaking that he would produce the girl on the adjourned date. In the meanwhile, he got a stay order from this Court. The question that arises is whether the order of the learned Chief Presidency Magistrate calls for any interference from this Court.

There can be no doubt that it would be very hard on the petitioners if without strong ground they were required to come from Tellicherry in North Malabar to Madras for the purpose of this petition unless the Magistrate was satisfied that their attendance was necessary. The petition was a very short one and the only statements on which the learned Magistrate could act were that there was a legal marriage on the 22nd September, 1940, and that on the 23rd September, 1940, the girl was taken away. When he issued his second order he had heard the story of the other side, which was that they had come to Madras to answer an advertisement in which the respondent was seeking for a bride and that finding that the respondent would not make a suitable husband they took the girl back again. With these two stories in front of him, I think the learned Chief Presidency Magistrate should have required from the respondent some further evidence that a lawful marriage had taken place; for unless he was satisfied that the marriage had taken place, the respondent clearly had no right to ask the Magistrate to have the girl brought back to Madras.

The learned Crown Prosecutor has pointed out that under S. 4 (Cl. 3) of the Madras Marumakathayam Act, notice of every marriage shall be given to some person appointed under the Act to register such marriages. If the learned Magistrate had been satisfied by a copy of such registration or otherwise that a marriage had really taken place, then the petitioners might have no cause for complaint in being required to come from Tellicherry in North Malabar to Madras to answer the charge; but they ought not to be required to do so unless the Magistrate had something more substantial before him than the respondent's petition as evidence that a marriage had taken place.

Moreover, one would have expected that together with an application under S. 552 of the Code of Criminal Procedure, there would have been a complaint under the Indian Penal Code of the offence of abduction.

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The learned advocate for the petitioners has further pointed out that the offence, if any, that was committed in Madras was abduction, and there can be no abduction unless force or deceit is used. There is nothing in the petition which was sufficient to satisfy the learned Magistrate that force or deceit had been used in taking away the girl from Madras. Moreover, an order under S. 552 of the Code of Criminal Procedure can only be passed if the girl is under sixteen years of age, which is not alleged in the petition.

It will follow from what has been said above that the order of the learned Chief Presidency Magistrate has to be set aside. One course that would be open to this Court would be to direct the Magistrate to enquire further into the matter and satisfy himself that an order under S. 552 of the Code of Criminal Procedure should issue; but as the dispute between the respondent and the petitioners seems to be one that could be decided much more satisfactorily in a Civil Court than by a summary order of a Magistrate, I do not think it in the interests of justice that the present proceedings should be continued.

The petition is therefore allowed and the proceedings before the Chief Presidency Magistrate quashed. The respondent may pursue his remedy in a Civil Court if so advised.

K. C. *Petitition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE ABDUR RAHMAN.

Veerabhadra Pillai .. *Petitioner* (Petitioner).*

v.

O. A. Narayanaswami Aiyar, Receiver and others .. *Respondents (Respondents 1 to 3).*

Veerabhadra Pillai v. Narayanaswami Aiyar.

Civil Procedure Code (V of 1908), O. 21, r. 90—Applicant to set aside sale a kudivaramdar—Whether application allowable.

The holder of a kudivaram interest has no *locus standi* to apply under O. 21, r. 90 to set aside a sale where it is of the melvaram interest only.

Adenna v. *Chinna Ramayya,* (1927) 54 M.L.J. 445: I.L.R. 51 Mad. 770, followed.

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* C.R.P. No. 182 of 1939. 25th October, 1940.

Veera-bhadra Pillai v. Narayana-swami Aiyar.

Petition under S. 115 of Act V of 1908 praying that the High Court will be pleased to revise the order of the District Court of West Tanjore dated 9th December, 1938 and made in E. A. No. 312 of 1938 in E. P. No. 24 of 1937 in O. S. No. 3 of 1919.

K. S. Ramamurthy Aiyar and *T. R. Sundaram* for Petitioner.

K.V. Srinivasa Aiyar and *T. K. Subramania Pillai* for Respondents.

The court passed the following:

ORDER.—A preliminary objection has been raised that this revision is not competent. The petitioner made an application under O. 21, r. 90, Civil Procedure Code. This has been refused by the lower Court on the ground that he has no *locus standi* to make the application. The order will show that the Court has not passed any order setting aside or refusing to set aside the sale and it is these orders alone which are appealable under O. 43, r. 1, Civil Procedure Code. If the lower Court's action, as Mr. Justice Oldfield said in *Sundaram* v. *Mausa Mavuthar*[1] consisted in a refusal to deal with the judgment-debtor's petition, a non-exercise of the jurisdiction must be held to be revisable since the decision was not a conclusion of law or fact but one in which the question of jurisdiction was involved. I would therefore overrule the preliminary objection.

The lower Court will report whether the entire property was sold in these proceedings or whether the melwaram interest alone was sold. The papers relating to proclamation and the order passed for sale may be sent along with the report. Time one month.

(In pursuance of the above order the District Judge of West Tanjore submitted a Report).

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This petition coming on for final hearing after the return of the aforesaid Report by the lower Court,

The Court delivered the following

JUDGMENT.—The only question to decide in this revision is whether the petitioner had a *locus standi* to present an applica-

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1. (1921) 40 M.L.J. 497: I.L.R. 44 Mad. 554 (F.B.).

tion under O. 21, r. 90, Civil Procedure Code. There was a little doubt at one time as to what was actually sold in the execution of the decree and I called for a report on that point. The learned District Judge has reported that the melwaram interest alone was sold and the proclamation of sale has also been sent which shows the same. There is no doubt on that point now and this is conceded by the petitioner's learned counsel.

The only question then is whether the petitioner who was a kudivaramdar could make an application objecting to the sale under O. 21, r. 90, Civil Procedure Code. If his interests are those of a kudivaramdar, they cannot be, within the language of O. 21, r. 90 Civil Procedure Code, said to have been in any way affected by the sale of the melwaram interest. There is an observation in *Adenna* v. *Chinna Ramayya*[1] which confirms me in my opinion.

The revision petition therefore fails and is dismissed with costs which will be shared by the decree-holder and the auction purchaser.

K.C. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT:—MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

V. Sreenivasachariar .. *Appellant** (*Applicant*)

v.

Bysani Krishnayya Chetti transferee decree-holder, insolvent, represented by the Official Assignee of Madras ... *Respondent* (*Respondent.*)

Madras Agriculturists' Relief Act (IV of 1938), S. 19—Mortgage decree for principal, interest and costs—Part payment towards decree—Appropriation partly for interest and partly for principal—Reappropriation for providing for costs under S. 19—Equitable course for the respective appropriations to principal and to interest to contribute rateably for the costs.

On a mortgage of 1925 for Rs. 7,500 a decree was passed in 1935, for Rs. 7,500 principal, Rs. 3,311-14-0 interest and Rs. 336-8-0 subsequent interest up to the date fixed for redemption and Rs. 1,515-8-0 taxed costs, and on 14th November, 1935, a sum of Rs. 8,500 and on 13th August 1936, a further sum of Rs. 500 was paid into Court towards the decree. On 16th

1. (1927) 54 M.L.J. 445 : I.L.R. 51 Mad. 770.

* O. S. A. No. 57 of 1940. 20th February, 1941.

Sreenivasa-chariar. *v.* Bysani Krishnayya.

April, 1937, part satisfaction was recorded to the extent of Rs. 9,000 and execution proceeded for the balance. It was found that before 1st October, 1937, the creditor had appropriated Rs. 3,500 towards interest and Rs. 5,000 towards principal out of the first deposit and though no actual appropriation was made with regard to the second Rs. 500 towards either principal or interest, the amount had been definitely adjusted to the decree when part satisfaction was recorded.

Held, that after the recording of part satisfaction in April, 1937, it cannot be contended that any portion of the Rs. 9,000 paid towards the decree remained unappropriated. If a definite appropriation can be proved it will stand except so far as an adjustment towards suit costs may be necessary. To the extent to which the debtor cannot show an appropriation in his favour, it will have to be presumed that the appropriation was towards interest. The first payment should be treated as having been made in the first instance towards the costs of the suit. So the appropriation of Rs. 3,500 towards interest and Rs. 5,000 towards principal will have to be undone so as to provide for costs with reference to the proviso to S. 19 of Madras Act IV of 1938 and for that purpose it will be equitable that the amount appropriated towards principal and the amount appropriated towards interest should contribute rateably in making up the amount required for reappropriation towards costs.

On appeal from the judgment and order of the Hon'ble Mr. Justice Venkataramana Rao dated the 4th September, 1939 and made in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in Application No. 1147 of 1938 in C. S. No. 42 of 1933.*

U. C. Gopalan for Appellant.

T. A. Rangachari for Respondent.

The judgment of the Court was delivered by

Wadsworth, J.

Wadsworth, J.—This is an appeal against an order of our learned brother Venkataramana Rao J., on an application under S. 19 of Madras Act IV of 1938 to scale down the debt due under a decree on a mortgage. The mortgage was for an amount of Rs. 7,500 and it was dated the 30th August, 1925. It was assigned to one Jagannatham Chetty who sued on the mortgage in C. S. No. 42 of 1933. There was a preliminary decree for the principal amount with Rs. 3,311-14-0 interest and Rs. 336-8-0 subsequent interest up to the date fixed for redemption and Rs. 1,515-8-0 taxed costs. Final decree was passed in February, 1935. In October 1935, the judgment-debtors obtained the leave of the Court to raise a sum of Rs. 8,500 on a first mortgage of one item of the hypotheca, the amount so raised being paid to the credit of the decree. And in pursuance of this arrangement, on the 14th November, 1935 the Insurance Company which had taken the mortgage deposited Rs. 8,500

* (1940) 1 M.L.J. 860.

Sreenivasa-chariar v. Bysani Krishnayya.

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towards the decree. In June of the following year, the decree was assigned to one Krishnayya Chetti and on 13th August, 1936 a further sum of Rs. 500 was paid into Court to the credit of the decree. On the 16th April, 1937 part satisfaction was recorded to the extent of Rs. 9,000 and execution proceeded for the balance.

In the view which we have taken on similar cases, it cannot be contended that after the recording of part satisfaction on the 16th April, 1937, any portion of this sum of Rs. 9,000 paid towards the decree remained unappropriated. The only question is how it was appropriated. If a definite appropriation can be proved it will stand except so far as an adjustment towards suit costs may be necessary. To the extent to which the debtor cannot show an appropriation in his favour, it will have to be presumed that the appropriation was towards interest and that to this extent interest is not available for cancellation on 1st October, 1937. The learned trial Judge did not go into the rather meagre evidence of actual appropriation but proceeded solely on the legal inferences in the absence of evidence of definite appropriation and arrived at a conclusion which cannot be supported in view of subsequent bench decisions arising out of Act IV of 1938. There was however, some evidence of actual appropriation of this payment of Rs. 8,500 adduced before the Official Referee, both on behalf of the judgment-debtors and on behalf of the decree-holder. The judgment-debtor stated in his evidence before the Official Referee that this sum of Rs. 8,500 was 'paid towards principal' and that the sum of Rs. 500 subsequently paid was 'paid towards the decree.' He gave no reason for an appropriation of this payment of Rs. 8,500 towards principal and it is difficult to see how, before the passing of Act IV of 1938, the judgment-debtor would have been benefited by such an appropriation, since both the principal and the interest included in the decree would bear interest at the same rate. In cross-examination he was apparently asked some further question about these payments and he said that these payments were 'towards the decree debt'. There the matter stands so far as the oral evidence goes, no one having been examined on behalf of the decree-holder. But at the close of the enquiry, the decree-holder exhibited an order assessing him to income-tax on the basis of the accounts covering this payment under the mortgage to the Insurance Company. The assessment order is Ex. VII,

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The Income-tax Officer apparently by a mistake speaks of a payment of Rs. 8,000 not of Rs. 8,500 and he says that the assessee has appropriated Rs. 3,500 out of this amount towards interest in his accounts and he proceeds for income-tax purposes to treat the payment as if it had been appropriated towards the full amount of interest due under the decree and assesses the decree-holder accordingly. Now, there is no reason to doubt that this order of the Income-tax Officer shows the actual state of the decree-holder's accounts at a time before any question arising under Act IV of 1938 was under consideration, the assessment being made in 1936. It is possible that, in order to escape income-tax, the decree-holder might have appropriated towards interest a less amount than he ought to have appropriated according to the revenue point of view. If so, it was apparently to his own disadvantage so far as proceedings under Act IV of 1938 are concerned. But the appropriation made by him towards interest in his books is to our minds a clear indication that the judgment-debtor is not speaking correctly when he says that the whole of this sum of Rs. 8,500 was at the time of the payment definitely appropriated towards principal. Had this been the case, the decree-holder would for income-tax purposes certainly have taken advantage of such an appropriation, which as things stood then would be very much in his favour.

We have come to the conclusion, therefore, that there was no appropriation at the time of the payment by the judgment-debtor, but that there was a subsequent appropriation by the entry in the decree-holder's books of Rs. 3,500 towards interest and the balance towards principal. This sum of Rs. 8,500 cannot therefore be treated as not definitely appropriated by the act of the creditor and the creditor's appropriation must stand, except in so far as the proviso to S. 19 requires re-appropriation.

So far as the later payment of Rs. 500 is concerned, there is no evidence of any actual appropriation towards either principal or interest. The amount was definitely adjusted to the decree when part satisfaction was recorded and it can no longer be treated as an unappropriated payment; and to the extent of this sum of Rs. 500, the debtor is not in a position to show that interest was outstanding on 1st October, 1937 for cancellation under S. 8 (1) of the Act.

Sreenivasachariar v. Bysani Krishnayya. — Wadsworth, J.

There remains a question regarding the re-appropriation of the first payment towards costs with reference to the proviso to S. 19. Under this proviso all payments made in respect of the decree must first be applied in payment of all costs as originally decreed to the creditor. The first payment was the payment of Rs. 8,500 and it has to be treated as having been made in the first instance towards costs of the suit. We have come to the conclusion that this sum of Rs. 8,500 was appropriated, as to Rs. 5,000, towards principal and, as to Rs. 3,500 towards interest by the subsequent act of the creditor. When this appropriation has to be undone with reference to the proviso, it seems equitable that the amount appropriated towards principal and the amount appropriated towards interest should contribute rateably in making up the amount required for re-appropriation towards costs. The decree will be amended accordingly.

Parties will pay and receive costs in this appeal according to their failure and success.

S. V. V. *Decree modified.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PANDRANG ROW AND MR. JUSTICE KING.

Kandasami Chettiar and another .. *Appellants* (Plaintiffs 2 and 3).*

v.

Messrs. Gokuldas Madanji & Co., Tuticorin, Tinnevelly District, and Bombay care of Mathridas Gokuldas (deceased) and others .. *Respondents (Respondents and their L.Rs.).*

Kandasami Chettiar v. Gokuldas Madanji & Co.

Indian Limitation Act (IX of 1908), Art. 182 (5)—Application for execution to transmit decree to another Court—Application ordered—Decree transmitted—Fresh application to transmit to original Court before decree was returned—Application returned—Application within three years thereafter for execution—If in time—If order returning a final order—Application to transferor Court before return of decree, if application to a proper Court.

Where on an execution application filed in 1932 to transmit the decree to Bombay for execution, an order was passed on 30th August, 1932 directing the transmission, and another application was filed in 1935 again to transmit the decree for execution to Bombay but the Court returned it with the endorsement "copy of the decree has not been received from the High Court, Bombay,—returned", the order is a final order within the meaning of Art. 182

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*A. A. O. No. 342 of 1939. 19th March, 1941.

Kandasami Chettiar v. Gokuldas Madanji & Co.

(5) as the Court must be deemed to have decided that it would have nothing further to do with the application. An application filed in 1937 within 3 years of the order is therefore in time

The Court which transmits the decree for execution to another Court does not thereby divest itself of all its jurisdiction and has jurisdiction to take certain measures in execution. It is therefore "a proper Court" within the meaning of Art. 182 of the Limitation Act and an application made to it is a valid application to save limitation.

Appeal against the order of the Court of the Subordinate Judge of Ramnad at Madurá dated the 5th October, 1937 and made in E.A. No. 165 of 1937 in O. S. No. 27 of 1919.

K. S. Ramamurti for Appellants.

T. K. Subramania Pillai for Respondents.

The judgment of the Court was delivered by

King, J.

King, J.—The question which arises in this appeal is one of limitation. The appellants are the decree-holders who filed an application in 1932 upon which the final order was passed on 30th August, 1932. That order was to transmit the decree for execution to Bombay. In February, 1935 another application was made by the decree-holders, again with the request that the decree should be transferred to Bombay for execution. That application was disposed of on the 27th February, in the following language by an endorsement upon the petition:

"Copy of the decree has not been received trom the High Court Bombay —returned".

In March, 1937 the original petition which had been presented in 1935 was again presented before the Court. It was signed by a fresh vakil as the original vakil who had signed it in 1935 was then dead, and the new date 22nd March, 1937 was appended to his signature. But at the same time the vakil mentioned to the Court that he was re-presenting the old application. This application was disposed of in October, 1937 by the order from which this appeal has been preferred. It treats the application as a re-presentation of the application of 1935 and holds on the authority of two Madras rulings that the application is clearly barred by limitation. It goes on to say:

"The order relied on by decree-holder as the final order to save limitation is not the final order and consequently this application is not in time."

Against this the decree-holders have appealed.

It is difficult to see the logic upon which the learned Subordinate Judge has based his decision. If in fact the application was one filed in 1935, it seems obvious that it was

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King, J.

filed in time, and the only method of disposing of it adversely to the decree-holders would seem to be to refuse to condone the two years' delay in re-presentation. If on the other hand the application be treated as a new one presented for the first time in 1937, then the question whether the order of the 27th of February, 1935 is or is not a final one will alone arise. In appeal after some hesitation, the learned advocate for the appellants has decided to confine his case to the latter hypothesis, that in spite of the ambiguous language with which the application was presented in 1937, it was in reality a fresh application. He then argued that the order of the 27th February, 1935 was a final order. We are of the opinion that this argument must succeed. No doubt in most cases when an application of this kind is returned to the applicant, it is returned for the definite purpose of remedying some defect and of being re-presented within a brief interval of time. In the present case, the Court has not stated that it required any action to be done by the applicant. It has merely used the word 'returned' after explaining the reason why the application was returned. We think the only interpretation that can reasonably be given to this language is that the Court had decided that it would have nothing further to do with the application, and if that interpretation is correct, the order of the 27th of February, cannot be other than a final order within the meaning of any of the rulings of the Madras High Court which deal with the interpretation of that expression.

It is however argued for the respondent that the application of 1935 was an application which was not made to the proper Court, and therefore though the order of the 27th of February was a final order, it cannot be relied upon by the appellant to save limitation. The reason suggested by the respondent in support of this argument is this: that in 1932 the Subordinate Judge of Ramnad had transmitted the decree to Bombay. In 1935 that decree was still in Bombay and had not been returned. Until it was returned from Bombay, the Ramnad Court had no jurisdiction to order it to be sent to Bombay and the Bombay Court alone had jurisdiction to deal with it. A very similar question has been dealt with by a Bench of this Court in *Rama Reddi* v. *Motilal Doga*[1]. The facts are not of course precisely similar, for the question there dealt with was an application

1. I.L.R. (1938) Mad. 326.

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King, J.

asking for a decree to be transmitted to an entirely new Court, but the principles upon which the learned Judges have based their decision clearly apply to the present case. They have analysed various provisions of the Civil Procedure Code and have held that when a Court transmits a decree to another Court for execution, it does not thereby divest itself of all its jurisdiction. It still retains that jurisdiction for some specific purposes which are set out by them. Art. 182 defines the 'proper Court' as the Court whose duty it is to execute the decree or order, and if in spite of the transmission of the decree to another Court there still remains the duty in the transmitting Court to take certain measures in execution, it is obvious, it seems to us, that it is the proper Court within the meaning of this definition. As we are thus in agreement with the decision in *Rama Reddi* v. *Motilal Doga*[1]. We do not consider it necessary to examine the decisions of any other High Courts. The result is therefore that there is no formal defect in the application filed in February, 1935. It was an application made in accordance with law and made to the proper Court within the meaning of Art. 182. As we have already said the order returning that application was a final order. The present application in 1937 was made within three years of that order and is therefore in time.

This appeal is accordingly allowed and the execution application directed to be restored to the file of the learned Subordinate Judge and disposed of according to law. The respondent will pay the appellant's costs throughout.

S.V.V. *Appeal allowed.*

[END OF VOLUME 1941—I.]

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1. I.L.R. (1938) Mad. 326.

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THE FEDERAL COURT OF INDIA.

[Appellate Jurisdiction.]

PRESENT :—SIR MAURICE GWYER, C.J., SIR SHAH SULAIMAN AND SIR S. VARADACHARIAR, JJ.

A.L.S.P.P.L. Subrahmanyan Chettiar .. *Appellant**

v.

Muthuswami Goundan *alias* Avanashi Goundan .. *Respondent.*
Advocate-General of Madras .. *Intervener.*

Madras Agriculturists' Relief Act (IV of 1938)—How far within the competence of the Madras Legislature—"Pith and substance rule"—Applicability—Government of India Act, 1935, S. 100—Legislative powers—Practice—Federal Court—Intervening Advocate-General—Not entitled to costs.

The provisions of Ss. 91 and 92 of the British North America Act, 1867, are analogous to those of the Government of India Act, 1935, S. 100 (1) and (3) and the principles laid down by the Judicial Committee in a long series of decisions for the interpretation of Ss. 91 and 92 of the British North America Act may therefore be accepted as a guide for the interpretation of similar provisions in the India Act. The rule evolved by the Judicial Committee whereby an impugned statute is examined to ascertain its pith and substance, or its true nature and character, for the purpose of determining whether it is legislation with respect to the matters in the Federal or Provincial lists, is equally applicable to cases arising under the India Act.

Mada Nagaratnam v. *Pavvada Sathayya*, (1939) 1 M.L.J. 272: I.L.R. (1939) Mad. 151 (F.B.), approved.

Sagarmal Marwari v. *Buthu Ram*, (1940) 3 F.L.J. 119 (Pat.), dissented from.

Where the holder of a decree passed before the commencement of Madras Act IV of 1938 (for a sum of money due on a promissory note) resisted an application for scaling down the decree on the ground that Ss. 7, 8 and 9 of Act IV of 1938 were beyond the competence of the Madras Legislature to enact,

Held, per *Gwyer, C.J.*, and *Varadachariar, J.* (*Sulaiman, J., dissenting*).—The pith and substance of Madras Act IV of 1938, whatever it may be, cannot at any rate be said to be legislation with respect to negotiable instruments or promissory notes and it is immaterial that many or even most of the debts with which it deals are in practice evidenced by or based upon such instruments. The Act cannot be challenged as invading the forbidden field of List I, No. 28.

In any event the provisions of the Act in their application to a decree passed before the commencement of the Act were within the competence of the Madras Legislature and may be justified by reference to Nos. 4 and 15 of List III and perhaps also No. 2 in List II.

[The other questions, namely : (i) whether and to what extent any of the provisions of the Act which relate to matters covered by List I may still be held to be valid on the ground that they are merely incidental to its main purpose; (ii) whether their incidental character will save them if they come in conflict with Federal or Central Legislation already occupying the field; and (iii) the true construction of S. 107 (1) of the Government of India Act, were left open].

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* Case No. 4 of 1940. 6th December, 1940.

Per *Gwyer, C.J.*—It is not the practice of the Federal Court to give costs to an Advocate-General intervening.

Per *Sulaiman, J.*—If a legislation is "with respect to decrees passed on promissory notes," then it is necessarily also "with respect to promissory notes." The provision of law with regard to decrees is inseparable from the law with regard to debts and the power to deal with decrees is dependent on the existence of the power to deal with debts. (i) The provisions of Ss. 8 and 19 of Madras Act IV of 1938 are in direct conflict with the provisions of the Negotiable Instruments Act read with the Usurious Loans Act and therefore amount to an undoubted trespass on a field already occupied by an existing Indian Law with respect to Negotiable Instruments, a Federal subject, and void to that extent. (ii) There is nothing in the Madras Agriculturists' Relief Act which really conflicts with any provision of the Hindu Law. (iii) Any repugnancy in the Act to the Indian Contract Act is cured by the assent of the Governor-General. (iv) As Usurious Loans come within money-lending any conflict with the Usurious Loans Act alone will not be material.

The facts of the case were as follows :—

The plaintiff A.L.S.P.P.L. Subramanyan Chettiar filed a suit (O. S. No. 174 of 1934) on the 2nd of August, 1934 on the file of the Subordinate Judges Court, Coimbatore, on of a promissory note executed by the 1st defendant on the 4th of March, 1926 for Rs. 2,975 which carried interest at 36 per cent. per annum. He also impleaded in that suit the minor sons of the executant and prayed for a decree for Rs. 7,569-9-0, being the amount due on the promissory note with interest calculated at 24 per cent. per annum to be realized from the 1st defendant personally and against the family properties of the other defendants. The suit was decreed as prayed for on the 1st November, 1934. The Madras Agriculturists' Relief Act (IV of 1938) came into force on the 22nd March, 1938. Thereupon the first defendant, the executant of the pronote, filed an application praying that the Court might enter satisfaction of the decree inasmuch as twice the principal sum of Rs. 2,500 of the suit pronote had been paid by the defendant. The Subordinate Judge following the decision of the Full Bench reported in *Mada Nagaratnam* v. *Pwvada Seshayya*[1] allowed the application and directed an order for the satisfaction of the decree to be recorded. The plaintiff thereupon preferred a revision petition to the High Court which came on for hearing before Mr. Justice Wadsworth, who, by his judgment dated 2nd May, 1939, dismissed the revision petition following the decision of the Full Bench, and he gave a certificate that the case involved a substantial question of law as to the interpretation of the Government of India Act under S. 205. The plaintiff thereupon appealed to the Federal Court and filed the following as his grounds of appeal :—

1. In respect of a promissory note dated the 4th day of March, 1926, executed by the respondent in favour of the appellant, the appellant instituted O. S. No. 174 of 1934 on the file of the Subordinate Judge's Court at Coimbatore, against the respondent and his undivided minor sons and obtained a decree dated 21-11-34 for a sum of Rs. 7,569-9-0 and costs Rs. 863-15-0 with further interest.

2. Madras Act IV of 1938, *viz.*, the Agriculturists' Relief Act was passed by the Provincial Legislature of the Madras Province and after having obtained the assent of the Governor-General on the 11th day of March, 1938, came into force on the 22nd day of March, 1938.

3. By petitions, *viz.*, I. A. Nos. 1052 of 1938 and 1587 of 1938 dated the 27th day of July, 1938 and the 1st day of November, 1938 respectively, the respondent applied to the

1. (1939) 1 M.L.J. 272 : I.L.R. (1939) Mad. 151 (F.B.).

Subordinate Judge's Court, Coimbatore, to scale down and after taking into consideration certain payments already made to the decree-holder, *i.e.*, the appellant herein, to enter up full satisfaction of the said decree by applying the provisions of Ss. 8 and 19 of the said Act.

4. One of the contentions of the appellant in the Subordinate Judge's Court was that the Act was *ultra vires* of the powers of the Provincial Legislature, that the Act would not affect a Negotiable Instrument or a decree passed thereon and hence the Court had no jurisdiction to entertain the petitions.

5. But in view of the Full Bench decision of the Madras High Court reported in *Mada Nagaratnam* v. *Puvvada Sahayya*[1] holding the said Act as *intra vires*, the said contention was overruled by the learned Subordinate Judge.

6. As against the decision the appellant preferred a Civil Revision Petition to the said High Court in C. R. P. No. 825 of 1939 on the ground that the Madras Act IV of 1938 was *ultra vires* of the powers of the Provincial Legislature and at any rate so far as the suit and decree based on a Negotiable Instrument were concerned, and that the said Full Bench decision of the High Court required reconsideration.

7. That when the petition came on for orders before His Lordship the Hon'ble Mr. Justice Wadsworth, His Lordship by order dated the 2nd day of May, 1939, rejected the petition in accordance with the said Full Bench ruling; but at the same time was pleased to grant a certificate under S. 205 of the Government of India Act to enable the appellant to take up the matter on appeal to the Federal Court if he so desired.

8. That the appellant being desirous of taking the question on appeal to this Hon'ble Court applied to the High Court by C. M. P. No. 4901 of 1939 under Rule 2 of Order 45 of the Code of Civil Procedure, and the High Court by its order dated 11th day of April, 1940, was pleased to admit the appeal.[2]

The appellant therefore begs to move Your Lordships against the said judgment and decision of the said High Court dated the 2nd day of May, 1939 on amongst others the following

GROUNDS.

1. For that the lower Courts erred in not holding that the Madras Agriculturists' Relief Act (IV of 1938) is *ultra vires* the powers of the Madras Legislature under the Government of India Act, 1935.

2. For that the lower Courts ought to have held that the matter with respect to which the law in question has been made is not with respect to any of the matters enumerated in any of the lists and hence the requirements of S. 104 of the Government of India Act not having been complied with, the Provincial Act has been enacted without jurisdiction.

3. For that the lower Courts erred in following the Full Bench decision of the Madras High Court in *Mada Nagaratnam* v. *Puvvada Sahayya*[1] which was, it is submitted, erroneous and contrary to Law.

4. For that the lower Courts ought to have held that the Act in question came under S. 107 (1) and not under S. 107 (2) of the Government of India Act. Hence the law in question being repugnant to the existing Indian Laws with respect to many matters enumerated in the concurrent Legislative list is void.

5. For that the lower Courts erred in their construction of Ss. 99, 100, 104, 107, 292, 293, 311 and 316 of the Government of India Act.

6. For that the decision of the lower Courts is against the well-established canons of interpretation as laid down in several cases by the Judicial Committee by this Hon'ble Court in *C. P. Motor Spirits Act case* and other decisions of the Courts in India and other countries where similar Federal Constitutions prevail.

7. For that the lower Courts ought to have held that the Act in question is *ultra vires* being retrospective and expropriatory.

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1. (1939) 1 M.L.J. 272 : I.L.R. (1939) Mad. 151 (F.B.).
2. (1940) 2 M.L.J. 170.

8. For that the lower Courts ought to have held that the operation of the Act in question being repugnant to S. 292 of the Government of India Act, the Provincial Act is therefore invalid.

9. For that the lower Courts ought to have held that in any event the said Act in question in so far as it affected promissory notes and decrees passed thereon is *ultra vires* of the Provincial Legislature.

10. For that the High Court ought to have given greater weight to the fact that laws with respect to jurisdiction and powers of all Courts except the Federal Court, with respect to any of the matters enumerated in List I of the 7th Schedule of the Government of India Act, can only be enacted by the Federal Legislature and all the provisions in the Provincial Act in question seeking to take away the powers of Courts with respect to enforcement of obligations arising under any of the matters enumerated in the said list are void.

11. For that if the Act in question in so far as it relates to promissory notes and other like instruments is invalid, then the entire Act is invalid, the provisions affecting the promissory notes, etc., being inextricably interwoven with other provisions of the Act.

12. For that the lower Courts ought to have held that as the Act in question has an extra provincial operation the same is *ultra vires* of the Provincial Legislature.

13. For that the pith and substance of the Act is clearly and directly to nullify the effect of all legal obligations and contracts including contracts relating to promissory notes and like instruments and enforcement of rights thereunder. It is submitted that the Provincial Act in question is one not incidentally, but substantially trenching upon the powers of the Federal Legislature. The principle that what cannot be done directly cannot be done indirectly applies to the Provincial Act in question. Hence the Provincial Act in question is void.

14. For that the High Court should have set aside the order of the Subordinate Judge passed on the judgment-debtor's application under Ss. 8 and 19 of the Madras Agriculturists' Relief Act.

The appellant, therefore, humbly prays that this appeal be allowed, that the Madras Agriculturists' Relief Act (IV of 1938) be declared *ultra vires*, that the High Court of Madras be directed to set aside the order of the Subordinate Judge passed on the judgment-debtor's application under those sections, and that costs in this Court and in the Courts below be allowed to the appellant.

The appellant further humbly prays that leave of this Hon'ble Court be allowed to him to raise ground No. 14 above as the decision of this Court on the said ground is necessary for a proper and final adjudication of the matter before this Court and to avoid multifarious proceedings.

The defendants did not enter appearance before the Federal Court in the appeal. The Advocate-General of Madras on instructions from the Provincial Government, with the permission of the Federal Court by an application filed under Order 36 of the Federal Court Rules, sought to intervene in the appeal to support the validity of the impugned enactment. The permission having been granted he was brought on record in the appeal as an Intervener. The following statement of the case was filed on behalf of the Advocate-General of Madras :—

1. With due regard to the primary matter dealt with by the impugned enactment, its subject-matter and legislative character, its true nature and its leading features, its pith and substance, the impugned legislation as a whole is within the legislative competence of the Provincial Legislature as falling within item 27 of the Provincial Legislative List and also under item 20 of the same list ; and is not one *with respect* to any subject enumerated in item 28 of the Federal Legislative List.

2. On a proper construction of the provisions of the Government of India Act, 1935, relating to the distribution of legislative powers, a power relating to the rate and amount

of interest payable under a promissory note or other negotiable instrument is not of the essence or substance of a law "with respect to" such instruments, even though an enactment dealing with such instruments may validly contain such a provision.

3. The expression 'money-lending' in item 27 of the Provincial Legislative List ought to be understood in a comprehensive sense as including legislation in respect of loans secured or unsecured and whatever be the form of security that the creditor might choose to take for the loan, and this would be apparent from an examination of the legislation in the several provinces in India prior to the commencement of the Government of India Act, 1935. It is not without significance that the Provincial Legislatures have acted on the same footing even after the Government of India Act, 1935, came into force.

4. The fact that agriculture is the major industry of India, that agriculture and everything connected with agricultural production has been committed to the Provinces of India over which the Provincial Legislatures have been given plenary powers, the fact that there was a growing load of indebtedness which was fast rendering agriculture uneconomic, was the main reason for Parliament conferring power on the Provinces over the subject of money-lending in order that the indebtedness of the agriculturists might be relieved. It is submitted that all these facts are surrounding circumstances which could be legitimately taken into account in interpreting the meaning and scope of the powers committed to the Provinces. Read in the light of these circumstances the impugned legislation is a valid enactment with respect to both money-lending and agriculture.

5. Consistently with the principles of interpretation laid down by the Judicial Committee as regards the construction of Federal Constitutions with enumerated powers, item 28 of the Federal Legislative List must be so read as not to detract from the plenary powers of the Provincial Legislature under item 27 of the Provincial List especially as any other construction would defeat the main purpose underlying the grant of legislative power to the Provinces under that item and as the very object and purpose for which the power was conferred under item 27, *viz.*, to enable the Provinces to relieve agriculturists from their growing indebtedness would be frustrated.

6. It is submitted that the impugned legislation being a general and comprehensive legislation affording relief to agriculturist-debtors is within the competence of the Provinces and the mere fact that this legislation dealing with all forms of loans and with all forms of securities also affects debts due under or secured by promissory notes, does not render the legislation one "with respect to" promissory notes falling within item 28 of the Federal Legislative List.

7. The principle of construction enunciated by the Privy Council in several decisions on the construction of the British North America Act that notwithstanding an attempt to create two mutually exclusive jurisdictions in the Provinces and in the Centre, subjects which in one aspect and for one purpose might fall under one head of power might in another aspect and for another purpose fall under a distinct and different head of power is as much applicable to the enumeration of powers under the Government of India Act, 1935, as to enumeration of subjects in Ss. 91 and 92 of the British North America Act, 1867.

8. On a proper construction of S. 100 and the Lists in Schedule VII, the mere fact that a legislation affecting the amount due or payable on promissory notes may in one aspect and for some purposes fall under the Federal Legislative List does not preclude the same being within the legislative competence of the Province in another aspect and for another purpose, *i.e.*, to enact a general legislation affording relief to indebted agriculturists. The dominance given to the Federal List under section 100 does not and cannot cut down the powers of the Provincial Legislatures at any rate until Federal Legislation occupies the field.

9. The correct interpretation of S. 100 of the Government of India Act, 1935, is to read the *non-obstante* clause in that section as performing the same functions as the similar clause at the beginning and at the end of S. 91 of the British North America Act, 1867, on which the former has been modelled.

10. On a proper construction of S. 107 and the other provisions of the Government of India Act, even if it be that it is open to the Central or the Federal Legislature to include

in a law "in respect of" promissory notes a provision as to interest, it is submitted that until such a law is enacted and the field occupied it is open to the Provincial Legislature to enact measures dealing with debts including incidentally those under promissory notes and the interest due thereunder. The present Negotiable Instruments Act is merely an existing Indian Law and not a Federal Law.

11. On a proper construction of the sections of the Government of India Act, 100, 107 and Schedule VII and applying the rule of interpretation laid down by the Judicial Committee in regard to the construction of similar constitutions, it is submitted that if the legislation in question is in pith and substance one "in respect of" a subject-matter allotted to the Provinces it is valid notwithstanding that it incidentally impinges or touches upon a possible power of the Federal Legislature.

12. The impugned enactment is also valid as falling within item 10 of the Concurrent Legislative List.

12-A. It is submitted that in any event where the question arises as here between the original parties to the contract of loan, there is nothing to prevent the Provincial Legislature from scaling down the debts.

13. In any event where the debt due under or secured by promissory notes has merged in a decree and has passed from the domain of contract into the domain of judgment, the enforcement of such decrees is within the legislative competence of the Provincial Legislature and does not any longer fall within item 28 of the Federal Legislative List. The provisions relating to decrees, their executability and any particular inhibition on the decree-holder realizing amounts in excess of those permitted by the enactment lie within the provincial power and are covered by items 21 and 2 of the Provincial List read with item 4 of the Concurrent Legislative List.

14. The prohibition against the holders of decrees realizing amounts in excess of those permitted by the enactment is within the power of the Provincial Legislature also under item 4 of the Concurrent Legislative List read with item 8 of the same list.

15. In any event the liability of parties other than the maker not being one resting on the promissory note but on the law relating to contract and the Hindu Law obligation of sons to discharge their father's debts, it cannot be treated as part of the law relating to promissory notes falling within item 28 of the Federal Legislative List.

16. The impugned enactment having been reserved for the assent of the Governor-General under the terms of S. 107 (2) its validity cannot be questioned on the ground that the provisions thereof are repugnant to the provisions of any existing Indian Law in regard to a matter in the Concurrent Legislative List.

17. S. 292 of the Government of India Act has really no bearing on the question, in that the section merely saves the operation of existing laws and leaves it to the appropriate Legislatures to enact measures having regard to the distribution of powers under S. 100 and Schedule VII, and thus throws no light on the competency of the Legislatures to enact the measure in question. If the impugned legislation were validly enacted within the powers conferred upon the Provincial Legislature by S. 100 read with Schedule VII, its validity cannot be questioned by any reference to the provisions of S. 292. It is therefore submitted that S. 292 is not of any importance in the decision of the questions arising in this appeal.

18. It is submitted that the general validity of the enactment does not arise for consideration by the Court on the facts of this appeal and this Court cannot be called upon to pronounce upon any such question. The contention in the grounds of appeal that the impugned enactment if invalid in regard to promissory notes, is totally void, on the ground that the valid and invalid provisions are interwoven, is incorrect on the facts and unsound in law.

19. The Act in question has not, and does not seek to have any, extra-provincial operation and cannot be invalidated on any such ground. In any event the appellant before the Court is a resident of the Province, his debt arose and was sued in the Courts of the Province and in these circumstances the question of the extra-provincial operation, if any, of the enactment does not fall to be considered.

20. The impugned legislation cannot be attacked on the ground that it is a colourable device to legislate on forbidden ground. The intendment, the object and effect of this enactment are clear from its several provisions, which is to reduce to reasonable proportions the interest payable in respect of all debts of agriculturists, however they might have arisen. In these circumstances the objection that it seeks to do indirectly what it cannot do directly is without substance.

Sir B. L. Mitter, the Advocate-General of India, with *P. S. Sarangapani Aiyangar* instructed by *B. Bannerji,* for the appellant, after referring to the facts of the case invited the attention of the Court to the terms of Ss. 7, 8, 9 and 19 of the Madras Agriculturists' Relief Act and the terms of Ss. 78 to 80 of the Negotiable Instruments Act. There was a direct repugnancy between the terms of Ss. 7 and 8 of the Madras enactment and the provisions of the Negotiable Instruments Act. Pronotes and Negotiable Instruments are specially and exclusively reserved for the Central Legislature and the Provincial Legislature is incompetent to affect them in any manner. Here it is not a question of any incidental trenching but a direct repugnancy between the provisions of the two enactments. Under the terms of S. 100 of the Government of India Act, a Provincial Legislature has no power to legislate in regard to subjects exclusively in the Federal field.

Varadachariar, J.:—On the facts of the present case, on the date when the Madras Act came into force the liability had become a decretal liability. The decree is not a negotiable instrument. How then can it be said that when the decree is sought to be scaled down one is trenching upon Item 28 of the Federal List?

Sir B. L. Mitter.—S. 19 in fact incorporates Ss. 7, 8 and 9 and if the Legislature is incompetent to enact Ss. 7 to 9, S. 19 falls with it.

Varadachariar, J.—The reference to S. 8 in S. 19 is merely for the computation of the amount.

Sir B. L. Mitter.—It is said that the impugned enactment can be justified under the power to legislate about "money-lending and money-lenders" in Item 27 of the Provincial List. Every liability of an agriculturist such as is dealt with by the enactment does not arise out of money-lending. An agriculturist buys some implements or goods and executes a promissory note for their value. That is not a transaction of money-lending. Even a liability in tort of an agriculturist is comprehended within the scope of the enactment. That could not be justified under the power relating to 'money-lending or money-lenders.' It is suggested in the judgment of the High Court that the enactment could fall under the item "agriculture." A mere reading of Item 20 as a whole would show that the mere fact that some benefit is conferred upon an agriculturist is not sufficient to render the Legislation one on the subject of 'agriculture.' The Act is not intended to improve agriculture. Unless an enactment has to do with agricultural production, it cannot be said to fall within that subject. It is then said that it falls under the head "contract." "Contract" occurs in the third (concurrent) list which is a sort of residuary list of subjects which have not already been included in the other lists. The proper method of

construing the scope of subjects in the concurrent list is to treat that as a residuary list taking in only those items or those parts of items which are not already included in the other two main lists. So, "Contract" in the concurrent list cannot be taken to include contracts as regards Pronotes or Negotiable Instruments which have already been allocated to the Federal List.

The invalidity in this particular case having arisen out of the Province attempting to trench upon the exclusive sphere allotted to the Federal Centre, S. 107 which applies only to repugnancy in regard to subjects in the concurrent list does not arise for consideration.

Ss. 91 and 92 of the British North America Act, 1867, do not furnish any analogy for the construction of the language of S. 100 of the India Act. *See* WYNES; Executive and Legislative Powers in Australia—where he utters a warning against importing analogy of Canadian decisions, into Australia. Under the terms of S. 100 of the Government of India Act if there is any overlap between Central and Provincial Power the area of the overlap is assigned exclusively to the Central Legislature.

Varadachariar, J.:—If it is suggested that once a matter touches an item within List No. 1, it is taken out of the power of the Province, can the Provincial Legislature pass an enactment that an unregistered money-lender cannot sue on loans advanced by him including the loans on pronotes?

Sir B. L. Mitter:—Such a Legislation might be good under the heading "money-lenders."

But under the guise of regulating money-lending you cannot trench upon the provisions of the Negotiable Instruments Act. This Act cannot be said to be an Act purporting to deal with money-lending. Providing some benefit to the agriculturist is not a legislation in relation to money-lending. The basic idea of a negotiable instrument is the right of the holder in due course to sue upon the instrument and recover the amount due, and this has been interfered with by this enactment.

The Chief Justice.—Suppose the Provincial Legislature says that debts arising out of betting and gambling even though evidenced by Promissory Notes are illegal and shall not be sued upon, would it be legal?

Sir B. L. Mitter:—Yes. In such a case the Provincial Legislature is legislating specifically on betting and gambling.

The power of the Provincial Legislature is under the terms of S. 100 subject to the powers of the Federal Legislature and when once the Central Legislature has exercised power under the existing Indian Law, *viz.*, Negotiable Instruments Act, the power of the Provincial Legislature must be read subject to the provisions of the existing law and in so far as the impugned enactment deals with a contractual liability under promissory notes, to that extent the Act is invalid. It is common knowledge as pointed out by the Full Bench of the Madras High Court that most of the debts of agriculturists in the Province are on promissory notes. What the Legislature cannot do directly,

it cannot do indirectly. As the Legislature felt itself unable to trench upon promissory notes in terms, it has adopted this device of scaling down the debts of agriculturists.

The fact that there is a decree before or after a particular date is immaterial. If the Legislature has no power to directly interfere with the promissory note, it cannot interfere with a decree passed on the foot of a promissory note. The statement of the Full Bench that if pro-notes were excluded from the Act, the Act would become nugatory, is a clear finding that the impugned Act is legislation in relation to pro-notes. Reference was also made by Counsel to the decision of the Patna High Court in 21 P.L.T. 739.

The Advocate-General of Madras (Sir Alladi Krishnaswami Aiyar) and *N. Rajagopala Iyengar*, for the intervener instructed by *Ganpat Rai*.

The first point to be noticed in this case is that the debt has merged into a decree long before the impugned enactment came into force. That decree has been obtained not merely against the maker of the Promissory Note but against his sons also which could only be on the basis of a suit on the debt. *Marutha Muthu Naicker* v. *Kadir Badsha Rowther*[1]. The impugned enactment provides for a statutory discharge and adjustment of decrees. The Code of Civil Procedure which is the law that regulates decrees, their execution, and their adjustment and satisfaction, is a matter over which the Provincial Legislature has complete control, the subject being in the Concurrent List. The description of the subject in Item 4 is most comprehensive. It is not merely Civil Procedure but every " matter " contained in the Code. A law which deals with the adjustment or satisfaction of decrees cannot be said to be a law relating to Negotiable Instruments or Bills of Exchange. You cannot go into the historic origin of a debt to find out whether the form which the debt has ultimately assumed is within the competence of the Provincial Legislature. In order that the Madras Act might be invalid in any part it must be shown that the Act is in subtance one dealing with the Promissory Notes and Negotiable Instruments. When once that debt has merged into a decree it passes from the domain of contract into the domain of judgment and the enforcement or satisfaction of that decree is within the competence of the Provincial Legislature.

The subject of money-lending and money-lenders in Item 27 of the Provincial List is comprehensive enough to include legislation such as is found here. Prior to the introduction of the New Constitution various Provincial Legislatures in India were affording relief in some way or other to agriculturists. The Court can legitimately take into consideration the question as to how the matter has been dealt with prior to the Government of India Act, 1935.[2] In the Legislation in the several Provinces which preceded the Government of India Act, provisions were enacted by which interest was reduced, and effect was given to the rule of Damdupat and so on. It

1. (1938) 1 M.L.J. 378: I.L.R. 1938 Mad. 658 (F.B.).

2. *In re*, C. P. and Berar Sales of Motor Spirits etc., Act 1938 : (1939) M.L.J. Supp. 1: 1939 F.C.R. 18.

is not to be presumed that the Provinces have been deprived of that power under the new Act.

Among the Constitutions of the British Dominions or Colonies the subject "Money-lending and money-lenders" is mentioned as a subject of Legislation only in the Government of India Act. Parliament took note of the fact that the problem of relief from money-lenders was not the same in each Province and that the solution to be attempted in each might vary. That is why, this power is expressly enumerated and is conferred upon the Provinces.

An analysis of the Madras Act shows that its framers had in view the promotion of agriculture as an industry in passing the Act. Broadly there are three types of tenures in the Madras Presidency, *viz.*, Zamindary, Inam and Ryotwari. The proprietor in the first two classes might be said to be an intermediary, while in the third he might be described as a peasant proprietor. The majority of Ryotwari pattadars are poor and hold small fragments of land. As a result of agricultural depression land was passing from the hands of the peasants into that of money-lenders. *See* The report of the Royal Commission on Agriculture, the report of the Central Banking Enquiry Committee, and the report of the Madras Rural Indebtedness Committee. It therefore became imperative to give some relief to the agricultural occupant of the land. How to promote agriculture and afford relief to those engaged in it as an occupation from their growing indebtedness, was the problem which presented itself before the Legislature. An examination of the various provisions of the enactment shows that the Act was intended to rehabilitate agriculture.

The subject-matter of the enactment clearly falls within the scope of the power under the item "Money-lending and money-lenders". Money-lending is a most comprehensive expression which may be defined as meaning the advancing of money for interest. It includes also lending of money in any form. Several Provincial enactments have been passed prior to the commencement of the Government of India Act in which the expression "Money-lending" has been used. It is there used uniformly in the sense of lending of money. In spite of the Negotiable Instruments Act various Provincial Legislatures have passed enactments in terms providing for reduction of debts including those evidenced by Promissory Notes, *Cf.*, the various enactments in the several Provinces which dealt with money-lending prior to the commencement of the Government of India Act. The general feature of this legislation was that it provided for the reduction of rates of interest on all debts including those on promissory notes. Similar legislation has been undertaken by several Provinces in India even after the commencement of the Act of 1935. The course of legislation previously followed can legitimately be taken into account in construing the words used in the entry in the List.

The next question is whether the Provincial Legislature is prevented from legislating upon the topic of "money-lending" by reason of the fact

that "Promissory Notes" find a place in the Federal Legislative List. Item 28 of that List refers to Legislation in respect of Cheques, Promissory Notes and Bills of Exchange. Apart from any other question, it is incorrect to conceive of the Negotiable Instruments Act as containing the entire law upon the subject of Promissory Notes and Bills of Exchange. For example, there are several enactments on the subjects enumerated in the Concurrent List which are complementary to the Negotiable Instruments Act, such as The Contract Act, The Evidence Act, The Insolvency Act, and The Limitation Act. In regard to these it cannot be contended that the law might not undergo a change as a result of Provincial legislation nor that if such an alteration takes place it would not affect or be applicable to Negotiable Instruments. Take for instance the subject of "consideration" dealt with under the Contract Act. A Province might under its power to deal with contracts alter the entire law as to consideration. Such an alteration would affect the contract embodied in Negotiable Instruments as much as other contracts. Similarly, what is lawful consideration is left to be determined by the Contract Act. If that Act were altered in this particular, it needs no argument to say that it would equally apply to a contract embodied in a Negotiable Instrument. It is therefore clear that the Negotiable Instruments Act is not self-contained. As such, it must be conceded that changes might take place in other branches of the law by reason of Provincial legislation in the Concurrent field which would also alter the law applicable to Negotiable Instruments.

The dominance given to the Federal List under S. 100 cannot be used to cut down the powers granted to the Provinces under the enumerated heads. The correct rule of interpretation is to read the two Lists together and try to give effect to both by a reasonable construction. The decision of the Patna High Court in the case reported in 21 P.L.T. 739 is, it is submitted wrong. The Judges there seem to favour a literal construction of the two Lists and cutting down from the Provincial field, of what by any stretch of language could be deemed to fall under the Federal List. They say that by reason of the language of S. 100 there is no scope for the application of the doctrine of "pith and substance" of legislation in cases arising in India. It is submitted that it is wrong.

S. 100 is modelled upon, and performs exactly the same function as the opening words of S. 91 of the British North America Act read with the last portion of that section and the decisions of the Judicial Committee laying down the principles for the reconciliation of powers enumerated in Ss. 91 and 92 of the British North America Act are equally applicable to the construction of the Lists in Schedule VII. The Privy Council have repeatedly held that t' e Legislation which in one aspect and for one purpose might be held to fall within the Central Power might in another aspect and for a different] u pose fall under the Provincial Power. *Hodge* v. *The Queen*[1], *John Deere Plow Co. Ltd.* v. *Wharton.*[2] The fact that the legislation incidentally trenches

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1. (1883) 9 A.C. 117.

2. 1915 A.C. 330.

upon a subject in the other list does not make it one "with respect to" that subject. *Day* v. *Victoria*[1], *Gallagher* v. *Lynn*[2], *Toronto Corporation* v. *York Corporation*,[3] *Ladore* v. *Bennett*[4], *Board of Trustees of the Lethbridge Northern Irrigation District* v. *Independent Order of Foresters*[5]. In the light of these it is submitted that a Legislation dealing with debts in general cannot be said to be a Legislation with respect to Promissory Notes or Bills of Exchange merely from the fact that it might affect the liability for interest on Promissory Notes. This enactment can be sustained under various heads of power in the Provincial and Concurrent Lists. In regard to the substantive matters it would fall under "contract" and under Item 27 of the Provincial List.

Interest is not an essential or integral part of a Negotiable Instrument. For instance the Bills of Exchange Act does not deal with interest at all. In the Canadian Legislative List, 'Interest' is mentioned as a different subject from Bills of Exchange. And even under the Indian enactment, interest payable on a Promissory Note under S. 79 is subject to the Usurious Loans Act, 1918 with its various Provincial amendments. The Usurious Loans Act is certainly a law with regard to money-lending within the absolute power of the Province to vary or alter.

As between the immediate parties to a Promissory Note as in this case, the negotiable character of the instrument does not come into play. It is treated and enforced merely as a debt. The sons can be made liable only on the footing of its being a debt. *Qua* a negotiable instrument the sons cannot be liable. *Maruthamuthu Naicker* v. *Kadir Badsha Rowther*[6]. Therefore in this particular case the suit must be regarded as one on the debt itself because the creditor has obtained a decree against the sons also.

There is no Federal Law in regard to Negotiable Instruments to which it can be said that the impugned enactment is repugnant. The Negotiable Instruments Act is merely an existing Indian law though on a subject in the Federal Legislative List. On that account it is not a Federal Law. Therefore any question of repugnancy between two enactments such as is contemplated by S. 107 does not arise in this case. The question is merely whether the impugned enactment is a legislation "with respect to" Promissory Notes so as to fall within the mischief of S. 100.

N. Rajagopala Iyengar, followed.

The fact that there is inconsistency between the provisions of the Negotiable Instruments Act and the provisions of the Madras Agriculturists' Relief Act does not by itself render the latter provisions invalid. If the Madras Agriculturists' Relief Act is on a proper construction of S. 100 of the Government of India Act and the subjects of Legislation allotted to the Provinces under List No. II or III within the legislative competence of the Province, then the mere fact that there is any collision between the provisions of the

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1. (1938) 4 Dom.L.R. 345.
2. 1937 A.C. 863.
3. (1938) A.C. 415.
4. (1939) A.C. 468.
5. (1940) A.C. 513.
6. (1938) 1 M.L.J. 378: I.L.R. 1938 Mad. 568 (F.B.).

Madras Act and the Negotiable Instruments Act cannot render the former invalid. S. 107 cannot be availed of in the present case to achieve that result. That section deals with repugnancy in two matters. Firstly, repugnancy between the provisions of a Federal Law which the Federal Legislature is competent to enact and the provisions of a Provincial enactment; Secondly, repugnancy between the provisions of an existing Indian Law on a concurrent subject and the provisions of a Provincial enactment. Though the term "Federal Law" has not been defined in the Act, it is clear from the definitions of the terms "existing Indian Law" and "Provincial Law" that it is Legislation enacted by the Centre after coming into force of Part III that is meant thereby. An existing Indian Law on a subject in the Federal List is not a Federal Law. To interpret the expression "Federal Law" as including that category would do violence not merely to the grammar of S. 107 but would be inconsistent with the normal construction of several other sections of the Act in which that expression occurs. S. 107 speaks of a law which the Federal Legislature is competent to enact and the provisions of a law passed by the previously existing Legislature cannot be indicated by those words. The Indian Legislature is clothed with the power of the Federal Legislature during the interim period prior to the commencement of Part II and the use of the expression "and accordingly" in S. 316 negatives the possibility of an argument that the law of the previously existing Indian Legislature is referred to by the expression "Federal Law." Further, the contrast between the terms "Federal Law" and "existing Indian Law" in S. 107 itself makes it clear that "Federal Law" cannot mean an "existing Indian Law" on a federal subject.

The mischief which an Act was intended to remedy, is a surrounding circumstance which a court might look at for the purpose of arriving at its object. *Eastman Photographic Materials Co.* v. *Comptroller-General of Patents, Designs and Trade Marks*[1]. The Reports of the Royal Commission on Agriculture and of Mr. Sathyanathan on Rural Indebtedness in the Province of Madras based on historic material are the surrounding circumstances which show the purpose and object of the enactment. Both of them show that it was necessary to relieve the agriculturist of indebtedness before agriculture as an industry might be promoted. They would also show that this enactment is one in relation to money-lending.

The suit being one between the immediate parties to the contract, between money-lender and his client, whatever considerations might apply to cases of a holder in due course, have no application here. Further, the debt here has ripened into a decree. There is no question of the decree being a Negotiable Instrument.

Sir B. L. Mitter replied. *Cur. ad vult.*

The Court delivered the following

JUDGMENTS.- *Gwyer, C.J.*:—In this case the appellant sued the respondents in the Court of the Subordinate Judge of Coimbatore for a sum of

1. (1898) A.C. 571.

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Rs. 7,569-9-0, the amount of principal and interest alleged to be due under a promissory note dated 4th March, 1926, for Rs. 2,975. On 1st November, 1934, he obtained a decree for the sum claimed, together with Rs. 863-15-0 for costs, with interest at 6 per cent. per annum from the date of the judgment on the principal sum of Rs. 2,975. On March 22nd, 1938, the Madras Agriculturists' Relief Act became law, and before that date the respondents had paid to the appellant sums which amounted in all to more than twice the amount of the principal debt. In July, 1938, the respondents presented a petition under the Act claiming to have the decree scaled down in accordance with the provisions of the Act, to which the appellant replied by alleging that the Act was beyond the competence of the Madras Legislature to enact. In November, of the same year there was a further petition by the respondents, praying that since they had paid more than twice the amount of the principal sum as well as the costs, the Court might be pleased to record under the Act full satisfaction of the decree. In February, 1939, a Full Bench of the Madras High Court in another case, *Mada Nagaratnam* v. *Puvvada Seshayya*[1], held that the Act was within the competence of the Legislature, and accordingly the Subordinate Judge allowed the two petitions and recorded full satisfaction of the decree. A revision application to the High Court was dismissed, but the High Court gave a certificate under S. 205 of the Constitution Act. The appeal now comes before this Court, and the substantial question to be decided is whether the Act was within the powers of the Madras Legislature, though there are subsidiary questions also involved.

The Act is an attempt to deal in a very drastic manner with the problem of rural indebtedness, which has vexed legislators since the days of Solon. It contains, as other provincial Acts passed on the same subject during the last few years have also contained, many unusual and at first sight startling provisions. It applies to all debts payable by an "agriculturist" at the commencement of the Act, and "agriculturist" is defined in very wide terms, so as to include not only persons cultivating agricultural land but certain others also who possess an interest in such land. "Debt" is defined as meaning any liability in cash or kind, whether secured or unsecured, due from an agriculturist, whether payable under a decree or order of a civil or revenue Court or otherwise, though land revenue or any tax or cess payable to the Central or Provincial Government or to any local authority, together with certain other liabilities not here material, are excluded. The definition appears to be wide enough to cover damages for an actionable wrong. It is then provided by S. 7 that, notwithstanding any law, custom or decree of the Court to the contrary, all debts payable by an agriculturist at the commencement of the Act are to be scaled down in accordance with the provisions of the Act; and by S. 8 (*inter alia*) that in the case of debts incurred before 1st October, 1932, where an agriculturist has paid to any

1. (1939) 1 M.L.J. 272 : I.L.R. 1939 Mad. 151 (F.B.).

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creditor twice the amount of the principal, whether by way of principal or interest or both, the debt, including the principal, shall be deemed to be wholly discharged. By S. 19, the Court may apply the provisions of the Act to a decree for the repayment of a debt obtained against an agriculturist before the commencement of the Act and, notwithstanding anything contained in the Code of Civil Procedure, amend the decree or enter satisfaction as the case may be. The Act contains no express reference to promissory notes or any other form of negotiable instrument, as debt relief legislation in other Provinces, to which our attention was drawn, has sometimes done. It should be added that it was reserved for, and received, the assent of the Governor-General.

The Federal Legislature has an exclusive power to legislate with respect to cheques, bills of exchange, promissory notes and other like instruments (List I, No. 28). The Negotiable Instruments Act, 1881, provides (S. 32) that in the absence of a contract to the contrary, the maker of a promissory note is bound to pay the amount thereof at maturity according to the apparent tenor of the note ; and (S. 79) that where interest at a specified rate is expressly made payable on a note, interest is to be calculated at that rate until payment or until such date after the institution of a suit to recover the amount as the Court directs. These provisions are not easily to be reconciled with the provisions of the Madras Act, where debts based upon promissory notes are concerned. The Court was therefore invited by counsel for the appellant to say that the Act was beyond the competence of the Madras Legislature, because it dealt with debts which in a great number of cases would be debts based upon promissory notes ; or that, if not wholly invalid, it was at any rate beyond the competence of the Legislature in so far as it might affect such debts, or, alternatively, ought to be construed as not applying to them.

A Full Bench of the Madras High Court, in the case already cited, have decided that the Madras Act does not trench in any way upon the exclusive powers of the Federal Legislature. " We do not regard the Madras Agriculturists' Relief Act," said the learned Chief Justice, delivering the judgment of the Court, " as really affecting the principles embodied in the Negotiable Instruments Act; Negotiation of a promissory note is not prohibited nor is it said that a maker or an indorser shall not be liable. The only effect of the Act, so far as negotiable instruments are concerned, is to reduce liability where the maker or indorser is an agriculturist. In providing for this the Provincial Legislature was acting in the interests of agriculture and regulating money-lending to agriculturists. It could never have been the intention of Parliament in conferring a general power on the Federal Legislature to legislate with regard to negotiable instruments to reduce the power of a Provincial Legislature to deal with subjects within its exclusive control. When examined, the Madras Agriculturists' Relief Act is in substance within the express powers of the Madras Legislature and the fact that in particular cases it may operate to reduce liability on contracts evidenced by negotiable instruments cannot affect its validity." The Chief Justice concluded by

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observing that the authorities, mainly decisions of the Judicial Committee on appeals from Canada, which he had already cited were definite on the point. It is therefore necessary to examine a little more closely the provisions of the Constitution Act and to see what light can be thrown upon them by decisions of the Judicial Committee, and in particular by decisions upon the provisions of the British North America Act.

S. 100 (3) of the Constitution Act provides that a Provincial Legislature has the exclusive power of legislating with respect to the matters enumerated in List II, the Provincial Legislative List.. But this power is expressly stated to be subject to the provisions of S. 100 (1), which give an exclusive power to the Federal Legislature to legislate with respect to the matters enumerated in List I, the Federal Legislative List. Hence, though Parliament has no doubt done its best to enact two lists of mutually exclusive powers, it has also provided, *ex majori cautela*, that if the two sets of legislative powers should be found to overlap, then the federal legislation is to prevail. And the reason for this is clear. However carefully and precisely lists of legislative subjects are defined, it is practically impossible to ensure that they never overlap; and an absurd situation would result if two inconsistent laws, each of equal validity, could exist side by side within the same territory.

The British North America Act, 1867, contains analogous provisions and it can scarcely be doubted that Parliament had those provisions in mind when it enacted the later Act. By S. 91 of the Canadian Act, the Dominion Legislature is given a general power to legislate for the peace, order and good government of Canada "in relation to all matters not coming within the classes of subjects by this Act assigned to the legislatures of the Provinces," and without prejudice to the generality of the power so given the exclusive legislative authority of the Dominion is expressly declared to extend to all matters coming within the classes of subjects enumerated in the section. S. 91 further declares that any matter coming within any of the classes so enumerated "shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the Provinces" [this corresponds to S. 100 (1) of the Government of India Act.] Then S. 92 gives the Provincial Legislatures exclusive authority to make laws in relation to matters coming within the list of (provincial) subjects enumerated in that section, the last class in the list being described as "generally all matters of a merely local or private nature in the Province" [these provisions correspond to S. 100 (3) of the Government of India Act.] As interpreted by the Judicial Committee, the British North America Act presents an exact analogy to the India Act, even to the overriding provisions in S. 100 (1) of the latter: "The rule of construction is that general language in the heads of S. 92 yields to particular expressions in S. 91, where the latter are unambiguous.": *per* Lord Haldane in *Great West Saddlery Co.* v. *The King*[1]. The principles laid down by the

1. (1921) A.C. 91 at 116.

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Judicial Committee in a long series of decisions for the interpretation of the two sections of the British North America Act may therefore be accepted as a guide for the interpretation of similar provisions in the Government of India Act.

It must inevitably happen from time to time that legislation, though purporting to deal with a subject in one list, touches also on a subject in another list, and the different provisions of the enactment, may be so closely intertwined that blind adherence to a strictly verbal interpretation would result in a large number of statutes being declared invalid because the legislature enacting them may appear to have legislated in a forbidden sphere. Hence the rule which has been evolved by the Judicial Committee whereby the impugned statute is examined to ascertain its "pith and substance" or its "true nature and character," for the purpose of determining whether it is legislation with respect to matters in this list or in that : *Citizens Insurance Co.* v. *Parsons*[1], *Russell* v. *The Queen*[2], *Union Colliery Co.* v. *Bryden*[3], *Attorney-General for Canada* v. *Attorney-General for British Columbia*[4], *Board of Trustees of Northern Irrigation District* v. *Independent Orders of Foresters*[5]. In my opinion this rule of interpretation is equally applicable to the Indian Constitution Act. On this point I find myself in agreement with the Madras High Court, and I dissent from the contrary view which appears to have been taken in a recent case by the High Court at Patna : *Sagarmal Marwari* v. *Bhuthu Ram*[6].

It is clear that the pith and substance of the Madras Act, whatever it may be, cannot at any rate be said to be legislation with respect to negotiable instruments or promissory notes ; and it seems to me quite immaterial that many, or even most, of the debts with which it deals are in practice evidenced by or based upon such instruments. That is an accidental circumstance which cannot affect the question. Suppose that at some later date money-lenders were to adopt a different method of evidencing the debts of those to whom they lend money ; how could the validity or invalidity of the Act vary with money-lenders' practice? I am of opinion therefore that the Act cannot be challenged as invading the forbidden field of List I, for it was not suggested that it dealt with any item in that List other than No. 28.

It was then contended that, even if not wholly invalid, either the Act was invalid in part, in so far as it did or might affect promissory notes, or that it ought to be construed as not applying to promissory notes at all. But these questions do not in my opinion arise in the present case, because the liability on which the Act operated was a liability under a decree of the Court passed before the commencement of the Act. It had ceased to be a debt evidenced by or based on the promissory note, for that had merged in the decree and had become a judgment-debt ; nor could the appellant any longer have sued upon the note. It was argued however that before the provisions of the Act could be applied to the decree, in accordance with S. 19

1. (1881) 7 A.C. 96.
2. (1882) 7 A.C. 829.
3. (1899) A.C. 580.
4. (1930) A.C. 111.
5. (1940) A.C. 513.
6. (1940) 3 F.L.J. H.C. 119.

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of the Act, it was necessary to have recourse to the terms of the note, in order to ascertain to what extent the provisions of S. 8 required or enabled the decree to be scaled down. But this could not affect the nature of the liability, which still remained a judgment-debt; and it was upon that liability and upon no other that the Act operated, even though it might be necessary to go into its earlier history for a particular and special purpose. In the present case the judgment-debt was already in existence when the Act was passed, and it is not necessary to consider whether any different principle would be applicable in the case of decrees made after its enactment. It is sufficient to say that here the Act has neither affected nor purported to affect any liability on a promissory note.

That the provisions of the Act in their application to the decree obtained by the appellant were within the competence of the Madras Legislature to enact does not seem to me open to doubt. They may be justified by reference to Nos. 4 and 15 of List III, perhaps also to No. 2 in List II; I do not say that there may not be others, but these will suffice.

A number of other matters were argued at the Bar on which, having regard to the view of the case which I have just expressed, it becomes unnecessary for me to express any opinion. There is the difficult question, assuming that the pith and substance of the impugned Act is with respect to matters covered by List II and not to any matters covered by List I, whether and to what extent any of its provisions which relate to matters covered by List I may still be held to be valid on the ground that they are merely incidental to its main purpose; and the further question whether their incidental character will save them if they come into conflict with Federal or Central Legislation already occupying the field. These may involve yet another question, that of the true construction of S. 107 (1) of the Constitution Act. But though, as I have said, I reserve my opinion upon all of them, I do not wish it to be assumed that I accept in its entirety the view of the Madras High Court that the impugned Act does not really affect the principles embodied in the Negotiable Instruments Act, for that proposition seems to me much too broadly stated. I doubt whether any provincial Act could, in the form of a debtors' relief Act, fundamentally affect the principle of negotiability or the rights of a *bona fide* transferee for value. Perhaps the position is different where the promissory note has never changed hands and is sued upon by the original payee; and it may be (though I do not decide the question) that an Act such as the Court is now considering can operate upon the original debt in such cases, even though the creditor has taken a promissory note in respect of his debt. If it were otherwise, the power of the Provincial Legislatures to enact remedial legislation in a field peculiarly their own would be very greatly hampered; so much so, indeed, that the Central Legislature might well find itself compelled to review the situation. But it would perhaps be inadvisable that I should say more on this occasion.

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I think that the appeal should be dismissed. As the respondents did not enter an appearance there will be no order for costs. It is not the practice of this Court to give costs to an Advocate-General intervening.

Sulaiman, J.:—This is a plaintiff's appeal arising out of a suit on a promissory note dated the 4th March, 1926, executed by the defendant No. 1 for Rs. 2,975 carrying interest at 36 per cent. per annum. The plaintiff claimed interest at 24 per cent. only, and the limitation was saved by payments made on the 3rd March, 1929, and the 24th February, 1932. Defendants Nos. 2 and 3 who contested the suit are the sons of defendant No. 1. The first court decreed the claim on the 21st November, 1934. On the 22nd March, 1938, the Madras Agriculturists' Relief Act (IV of 1938) came into force, after the assent of the Governor-General had been given. While the decree was in execution, the judgment-debtors applied to the Court on the 24th July, 1938, alleging that, in view of the scaling down of the interest under the new Madras Act, the decree had been satisfied. Objection was of course taken to this by the decree-holder. The Court on the 11th February, 1939 held that the Madras Act was *intra vires* of the Provincial Legislature and ordered satisfaction of the decree to be recorded. On the 27th April, 1939, the plaintiff filed a Revision in the High Court, but it was rejected by a single Judge on the 2nd May, 1939, in view of an earlier pronouncement of a Full Bench of that Court. The learned Judge granted the required certificate under S. 205 (1) of the Government of India Act. The application for leave to appeal was heard by a Division Bench which held[1] that, in view of clause 15 of the Letters Patent, the order of the single Judge was a final order. The High Court accordingly admitted the appeal.

An Explanation.—I feel that I owe an explanation for stating my reasons separately even on points on which there may be concurrence. I do not think that there is anything in the provisions of the Government of India Act, 1935, barring a separate statement of the reasons. S. 214 (4) merely lays down that " no judgment shall be delivered by the Federal Court save in open court and with the concurrence of a majority of the judges present at the hearing of the case, but nothing in this sub-section shall be deemed to prevent a judge who does not concur from delivering a dissenting judgment." This sub-section has obviously a two-fold effect. First, there must be the concurrence of a majority of the judges in the final conclusion. If the judges were equally divided the decision would be wholly inconclusive and therefore utterly useless, as it would be impossible to give any direction to a subordinate court to select one opinion in preference to the other. Secondly, it is emphasised that a judge who does not concur is not prevented from delivering a dissenting judgment. The sub-section does not say that reasons cannot be stated separately by the judges who concur in one judgment.

No doubt the practice of the Judicial Committee, unlike that in the House of Lords, is that one of their Lordships delivers the judgment, which is taken to be on behalf of all. But obviously there are three main reasons

1. (1940) 2 M.L.J. 170.

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for it. In the first place, the decision of their Lordships of the Privy Council is in the form of a Report submitted to His Majesty . It would accordingly be wholly inappropriate to submit conflicting opinions to His Majesty. In the second place, their Lordships hear appeals from the Dominions, India and the Colonies, and it is desirable that it should not appear that there has been any divergence of opinion, so that there may be no doubts as to the correctness of the law which the courts have to follow. In the third place, the Privy Council is the ultimate Court of Appeal and it is more approriate that the law should be settled definitely and made certain, without any expectation of its being changed if a majority in a later case comes to prefer a contrary opinion.

None of these reasons applies to the Federal Court. Here a dissenting judgment is expressly allowed by Statute. In particular, as the decision of this Court is subject to an appeal to their Lordships of the Privy Council, it is only fair that a judge who wishes to state his reasons separately should have an opportunity to do so, in order that his full reasons may be before their Lordships when the appeal comes to be heard. It often happens that there are reasons which may not be accepted by the other members of the Bench as sound or which may not appeal to them as being important, but which are considered by the judge as being necessary to support the view taken by him. Frequently the way in which propositions of law may be stated are not absolutely identical. While concurring in the final result, judges sometimes differ in stating their reasons. Grounds of decision are no less important in constitutional cases, as they may have to be applied again in a different class of cases. In the early years of the working of a constitution, when ideas have not crystallized, and rules of law applicable to it have not been clearly formulated, differences of opinion are not uncommon.

Such a practice is in consonance with that prevailing in the High Court of Australia and the Supreme Court of South Africa. In Canada, even after over 70 years, during which the Privy Council has made numerous pronouncements on the Canadian Constitution, separate judgments are still delivered. Even in non-constitutional cases, if important, separate judgments are frequently delivered in the Court of Appeal in England.

The Impugned Act.—The impugned Act is, the Madras Agriculturists' Relief Act, 1938 (Madras Act IV of 1938), which received the assent of the Governor-General on the 11th March, 1938. The object of the Act, as mentioned in its Preamble, was to provide for the relief of indebted agriculturists. Its relevant provisions may be summarized as follows. S. 3 (ii) (*a*) defines "agriculturist" as a person who has a saleable interest in any agricultural or horticultural land, with certain exceptions. S. 3 (iii) defines "debt" as meaning any liability in cash or kind, whether secured or unsecured, due from an agriculturist, payable under a decree or order or otherwise

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with two exceptions. S. 7 lays down

"Notwithstanding any law, custom, contract or decree of court to the contrary, all debts payable by an agriculturist at the commencement of this Act, shall be scaled down in accordance with the provisions of this Chapter.

No sum in excess of the amount as so scaled down shall be recoverable from him or from any land or interest in land belonging to him ; nor shall his property be liable to be attached and sold or proceeded against in any manner in the execution of any decree against him in so far as such decree is for an amount in excess of the sum as scaled down under this Chapter."

S. 8 relates to debts incurred before the 1st October, 1932, and provides :

(1) "All interest outstanding on the 1st October, 1937, in favour of any creditor of an agriculturist whether the same be payable under law, custom or contract or under a decree of Court and whether the debt or other obligation has ripened into a decree or not, shall be deemed to be discharged, and only the principal or such portion thereof as may be outstanding shall be deemed to be the amount repayable by the agriculturist on that date" ;

and

(2) "Where an agriculturist has paid to any creditor twice the amount of the principal whether by way of principal or interest or both, such debt including the principal, shall be deemed to be wholly discharged."

The main part of S. 19 is as follows :—

"Where before the commencement of this Act, a Court has passed a decree for the repayment of a debt, it shall, on the application of any judgment-debtor who is an agriculturist or in respect of a Hindu joint family debt, on the application of any member of the family whether or not he is the judgment-debtor or on the application of the decree-holder, apply the provisions of this Act to such decree and shall, notwithstanding anything contained in the Code of Civil Procedure, 1908, amend the decree accordingly or enter satisfaction, as the case may be."

The first question for consideration before us is whether the provisions of S. 8 read with S. 19 are "with respect to" a subject-matter in List II, as to which the Provincial Legislature has exclusive authority, or in List III, as to which it has concurrent authority, the repugnancy, if any, being cured by the assent of the Governor-General, or whether it is "with respect to" a subject within List I, as to which it has no legislative power at all.

Pith and Substance.—No doubt, every effort appears to have been made to make the three Lists as comprehensive and exhaustive as well as exclusive as possible ; and it may well be that barring personal or customary laws, it would only be extremely rare cases which would not come in any one of these three Lists so as to fall within the residual powers of legislation dealt with by S. 104 of the Act. Nevertheless, in view of the large number of items in the three Lists, it is almost impossible to prevent a certain amount of overlapping. Absolutely sharp and distinct lines of demarcation are not always possible. Rigid and inflexible watertight compartments cannot be ensured. A hard and fast rule of exclusion derived from the strict literal language of S. 100 may therefore be quite impracticable and unworkable. To avoid such difficulties the Imperial Parliament has thought fit to use the expression "with respect to", which obviously means that looking at the legislation as a whole, it must substantially be with respect to matters in one List or the other. A remote connexion is not enough. Those words do not

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connote the idea that it must be absolutely and exclusively within one List and not encroaching, not even in an indirect way, upon any other.

As pointed out by me in the U.P. Regularizations of Remissions Act case[1] their Lordships of the Privy Council in dealing with Canadian cases have repeatedly laid down the test that in order to see whether an Act is in respect of a particular subject, one must look to "its true nature and character" and to its "pith and substance." It is quite wrong to assume that the doctrine of pith and substance laid down by their Lordships is some special doctrine exclusively applicable to the Canadian Constitution. Indeed, Lord Atkin, in the House of Lords in *Gallagher* v. *Lynn*[2] applied this doctrine, previously applied to the Constitution in a Federal system, to the Constitution of the Northern Ireland. His Lordship held that in pith and substance the Milk and Milk products Act, 1934, was not a law "in respect of" trade, but was a law for peace, order and good Government "in respect of" precautions taken to secure the health of inhabitants of Northern Ireland by protecting them from the danger of an unregulated supply of milk. In turn, the observation made in Gallagher's case[2], was quoted again in *Shannon* v. *Lower Mainland Dairy Products Board*[3]. There can therefore be no doubt that this doctrine of pith and substance is of a general application, and in no way restricted to the peculiar language employed in the British North America Act, 1867.

In view of the successive pronouncements of their Lordships of the Privy Council, though made mostly with regard to Canadian cases, it is unreasonable to assume that Parliament contemplated from the use of the words "with respect to" in the Indian Act that any overstepping beyond the limit, howsoever small or insignificant, and any encroachment upon the field of List I, howsoever unimportant, should make the Act wholly void. Incidental encroachment is not really forbidden. We have therefore first to see whether the impugned Provincial Act is "with respect to" any of the matters in List II. If this is not so, then the Act must fall to the ground. If it falls within any of the matters enumerated in that List, then we have to see next whether it also falls within any of the matters in List III. If it does and no assent of the Governor-General has been obtained, it must again fall to the ground if it conflicts with an existing Indian law. But if such assent has been obtained, then it will for the time being remain valid. Lastly we have to see whether it falls within any of the subjects mentioned in List I. If it does not, then there is no difficulty, but if it does, then we have to see further whether the Act is really "with respect to" any of the matters in List I. If it is so, then the Act must fall to the ground. If it is not, then obviously the Act indirectly, or as it has been said "incidentally" but not in substance, trenches upon List I. But in order to establish that the provisions of Ss. 7, 8 and 19 of the Madras Act are within the authority of the Provincial Legislature, it is

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1. *The United Provinces* v. *Mst Atiqa Begum.*

2. (1937) A.C. 863 at 870. 3. (1938) A.C. 708, at 710.

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not necessary for the respondents to show that the provisions come within any single category. So long as it can be shown that all the provisions contained therein fall within List II or List III, the Province would have *prima facie* an authority to legislate, unless it can be shown that it is with respect to any matter in List I, or is void on account of any repugnancy.

The Substance.—The substance of the Act is to give relief to agriculturists in respect of interest accruing upon the debt due from them. In one aspect it relates to money-lending and money-lenders because the reduction of interest on loans made to them by money-lenders would affect money-lending transactions. It is certainly a measure relating to agriculturists in the main, though an agriculturist is defined in a somewhat wider sense and though the debt due from him is not confined to loans taken for agricultural purposes, but includes any liability due from him. But there can at the same time be no doubt that the scheme of the Act is to benefit the agriculturists as a class and relieve them from onerous burden of high interest, from which the Provincial Legislature thought they had been unfairly suffering. It may be, literally speaking, difficult to say that benefit to agriculturists (defined in a somewhat wide way) is included in the term "agriculture." On the other hand, it may well be that unless agriculturists are relieved from their financial troubles, agriculture itself may suffer. Again, agricultural lands may deteriorate in value if they are sold frequently at auction in lieu of debts, and pass from hand to hand, sometimes to persons who are unable to cultivate them themselves. Further, the provision for scaling down interests is certainly an interference with the contract between the lender and the borrower, and can well come within the category "contract": List III, entry No. 10.

It may be that in view of the wide definition of "agriculturist," all the provisions do not come within the category agriculture; and it may also be that in view of the circumstance that "debt" means any liability, whatsoever, all the provisions may not come within the category "money-lending." And it may also possibly be that in some extreme cases the liability may go outside the category "contract," and may fall within "trade and commerce," (*e.g.*, unpaid purchase-money). But taking all the provisions together and considering the Act as a whole, it cannot be doubted that it is with respect to matters in Lists II and III. It is most difficult to place it outside these two Lists. Indeed, the Advocate-General of India has conceded that he cannot lay his finger on any category in List I, within which this Act could fall. He therefore felt compelled to urge before us that the Act deals with matters outside all the Lists, and can therefore come only under the residual power mentioned in S. 104 of the Indian Act. But resort to that residual power should be the very last refuge. It is only when all the categories in the three Lists are absolutely exhausted that one can think of falling back upon a *nondescript*. It seems to me that this cannot be done in the present case. The legislative practice in India prior to the commencement of the Government of India Act also shows that in the various Provinces there were existing

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legislations for relief from high rates of interest. It is therefore impossible to hold that the impugned Act is wholly outside Lists II and III of the Seventh Schedule.

Negotiable Instruments.—As the impugned Act deals with all debts of agriculturists, it necessarily includes their debts due on negotiable instruments as well. But List I, entry No. 28 specifically and expressly assigns "cheques, bills of exchange, promissory notes and other instruments" to the Federal Legislature. Being of all India importance there was a special reason for assigning negotiable instruments to the Federal Legislature. A uniformity of practice as regards these for the whole of India is necessary. As they can be freely negotiated, they can circulate from Province to Province, and after successive endorsements can even be sued upon in Provinces other than those in which they were executed. As they pass from hand to hand, holders in due course have to be protected. They are allowed to presume that the consideration evidenced by such instruments is due in full. Holders in due course cannot be expected to inquire and ascertain whether the original maker had been an agriculturist or not; and it would be grossly unfair to such holders, if after having paid almost full consideration for such instruments, they were confronted in a suit brought upon them with a Provincial law that cuts down interest which accrued even prior to the passing of that Act. As the impugned Act deals with debts in general, it would be difficult to say that the Act, taken as a whole, is "with respect to" negotiable instruments mentioned in the aforesaid category. But at the same time it is impossible to deny that the Act encroaches upon the field covered by such instruments. It would have been open to the Provincial Legislature expressly to exclude such instruments from the operation of this Act, (as had been done partially in S. 2 (vii) (e) of the C. P. Act XIII of 1934); but that has not been done. It is accordingly impossible to hold that there is no trespass on the Federal legislative field. There is an apparent overlapping, and no clear cut demarcation is discernible. The question is how this obvious conflict can be avoided.

Restricted Interpretation.—The principle of interpretation which was applied by me in the C. P. and Berar Sales of Motor Spirit and Lubricants Taxation Act, 1938, case[1] was that it should certainly be our earnest endeavour to avoid a conflict between two apparently competing entries, as too liberal an interpretation given to both of them might create a clash. "As far as possible, an undefined term should not be given such a wide scope as to include a particular provision." If a subject comes within a special and specific provision, and can only by defining and enlarging the meaning of the words be brought within the scope of the general, then the special provision should be considered to be exclusive of the other. But, of course, where such a restricted interpretation is not possible overlapping may be inevitable.

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1. (1939) F.C.R. 18 at pp. 74-75 and 87=1939 M.L.J. Suppt. 1.

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Principle of Exception.—This principle, coupled with that of an exception to a general provision, was also applied in that case by my Lord the Chief Justice, who relying on the *Bank of Toronto* v. *Lambe*[1] observed (pp. 49-50, F.C.R.)[2] "it would accord with sound principles of construction to take the more general power, that which extends to the whole of India, as subject to an exception created by the particular power, that which extends to the Province only. It is not perhaps strictly accurate to speak of the provincial power as being excepted out of the federal power, for the two are independent of one another and exist side by side. But the underlying principle in the two cases must be the same, that a general power ought not to be so construed as to make a nullity of a particular power conferred by the same Act and operating in the same field, when by reading the former in a more restricted sense effect can be given to the latter in its ordinary and natural meaning." My brother Jayakar, J., on p. 118, relying on the ruling in *In re Marriage Legislation in Canada*[3] adhered to the principle of exception and observed "In other words, as I interpret the two entries, entry No. 45 (List I) may be said to contain a general power to levy excise duty at all stages. As an exception to this, a portion of the power is cut out and allocated to the Provinces under entry No. 48 (List II). It operates as an exception to the general power conferred by entry No. 45."

On the other hand, at p. 94, I did not feel myself able to apply the principle that where a particular power comes within both the two mutually exclusive jurisdictions, as in Canada, it should be regarded as an exception to the general one. I pointed out that an exception falls within and not outside a general provision, the essence of the principle being that a particular exception restricts a general provision, although covered by it. In the Indian Constitution there being a definite provision for overlapping, where such an overlapping is inevitable, the general power of the Centre would override even a particular power of a Province. I was of the opinion that the power of the Centre to tax consumption, if inclusive, would not admit of any exception in favour of the Provinces, but must prevail. The maxim *generalibus specialia derogant* cannot be appropriately applied to the three competing Lists. I see three difficulties in importing from the Canadian cases the doctrine of the exception to the general provision. In the first place, it may very often be difficult to decide which is general and which is particular or special. The mere fact that a Central Act may apply to the whole of India whereas a Provincial Act to a smaller area of the Province, would not make the latter an exception, for that would in most cases make a Provincial law override a Central law. In some cases two subjects may both be general, and only particular parts of them may be overlapping. For instance 'a promissory note' is a general category, but a 'promissory note executed by an agriculturist' is special. On the other hand, 'debt' is general, but 'debt due on a promissory note' is special. Either of the two categories 'debt due on a pro-

1. (1887) 12 A.C. 575 at pp. 586-587.
2. (1939) 2 F.L.J. 26.
3. (1912) A.C. 880 at pp. 885-887.

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missory note' and 'debt due from an agriculturist' can be regarded as particular and the other more general according to the point of view from which we look at them. A second serious difficulty is that by applying the rule of exception, we would have to cut out, as Jayakar, J., has expressly said, a portion of the power given to the Centre and allocate it to the Provinces exclusively, so that even though the general provision would include such a power, the Centre would be prevented from legislating with respect to it at all. The third difficulty in the way of importing such a rule is that the provisions in the two Constitutions are not identical, and the categories are not *in pari materia.*

Canadian Sections.—Secs. 91 and 92 of the British North America Act show the dominant position of the Dominion Legislature, but with restrictions. First of all, power is given to the Dominion to make laws for "the Peace, Order, and good Government of Canada"; but from this are excepted the Classes of Subjects exclusively assigned to the Provincial Legislatures under S. 92. The exception itself is, however, subject to the exclusive power of the Dominion Legislature with respect to matters specifically enumerated in S. 91. It is then emphasized that any matter coming within any of the Classes of Subjects specified in S. 91 shall not be deemed to come within the Class of Matters of local or private nature comprised in the enumeration of the Classes of Subjects assigned to the Provincial Legislatures. The difficulty in Canada has been that the power of the Dominion Legislature extends to the very wide field "Peace, Order and good Govermnment," and also includes the residuary power in respect of matters not allocated to the Provinces. Another difficulty is that the last Class in S. 92 is also expressed in general language "Generally all Matters of a merely local or private Nature in the Province." Again the Provinces have power as regards "Property and Civil Rights in the Province." There is a further complication arising from the categories direct and indirect taxation. In particular while S. 91 specifically mentioned "26. Marriage and Divorce," S. 92 also specifically mentioned "12. The Solemnization of Marriage in the Province." In view of such general categories, it is no wonder that overlapping was not impossible. And yet there was no statutory provision corresponding to S. 107 of the Indian Act.

Their Lordships of the Privy Council in the various Canadian cases which came up for consideration always laid down that the competing subjects in the two Lists should be read and interpreted together so that it may be possible "to arrive at a reasonable and practical construction of the language of the sections, so as to reconcile the respective powers they contain, and to give effect to all of them" [*Citizens Insurance Co. of Canada* v. *Parsons*[1]]. But as overlapping was inevitable, their Lordships further evolved the principle "Notwithstanding this endeavour to give pre-eminence to the Dominion Parliament in cases of a conflict of powers, it is obvious that in some cases where this apparent conflict exists, the legislature could not have intended

1. (1881) 7 A.C. 96 at p. 109.

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that the powers exclusively assigned to the Provincial Legislature should be absorbed in those given to the Dominion Parliament."

In *In re Marriage Legislation in Canada*[1], the question for consideration was whether in view of the category "Marriage" in S. 91, the category "The Solemnization of Marriage in the Province" could be completely excluded from the authority of the Provincial Legislature. There were only two alternatives open : first, that the solemnization of marriage which was specifically and expressly assigned to the Provinces should be considered as a particular exception to the general provision about Marriage, or secondly, it should be held that Parliament had made an awful mistake in specifically allotting the solemnization of marriage to the Provinces, when in view of the more general category "Marriage" they could not legislate with respect to such solemnization at all. Their Lordships naturally preferred the former course. In the *Great West Saddlery Company, Ltd.* v. *The King*,[2] Lord Haldane after stating 'the rule of exception' applicable to the heads of Ss. 91 and 92, added "Neither the Parliament of Canada nor the Provincial Legislature have authority under the Act to nullify, by implication any more than expressly, Statutes which they could not enact."

Indian Section.—Now although the object of S. 100 of the Government of India Act is the same, the language is not identical. Taking S. 100 strictly literally, it would certainly follow from the double restriction imposed on a Provincial Legislature that its exclusive power is limited so as to ensure that Federal laws must dominate in the fields of Lists I and III. While the Federal Legislature is given power, it is expressly provided that "a Provincial Legislature has not power to make laws with respect to any of the matters enumerated in List I." And this exclusion of power is "notwithstanding anything in the two next succeeding sub-sections." Again in sub-s. (2) while both the Federal Legislature and a Provincial Legislature have power to make laws with respect to any of the matters enumerated in List III, this is "notwithstanding anything in the next succeeding sub-section." The exclusive power of a Provincial Legislature with regard to matters in List II is provided for in sub-s. (3), but it is again emphasised that this last sub-section is "subject to the two preceding sub-sections." On a very strict interpretation of S. 100, it would necessarily follow that from all matters in List II which are exclusively assigned to Provincial Legislatures, all portions which fall in List I or List III, must be excluded. Similarly, from all matters falling in List III, all portions which fall in List I must be excluded. The section would then mean that the Federal Legislature has full and exclusive power to legislate with respect to matters in List I, and has also power to legislate with respect to matters in List III. A Provincial Legislature has exclusive power to legislate with respect to List II, minus matters falling in List I or List III ; has concurrent power to legislate with respect to matters in List III, minus matters falling in List I. In its fullest scope, S. 100 would then mean that if it happens that there

1. (1912) A.C. 880.
2. (1921) 2 A.C. 91.

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is any subject in List II which also falls in List I or List III, it must be taken as cut out from List II. On this strict interpretation there would be no question of any real overlapping at all. If a subject falls exclusively in List II and no other List, then the power of the Provincial Legislatures is supreme. But if it does also fall within List I, then it must be deemed as if it is not included in List II at all. Similarly, if it also falls in List III, it must be deemed to have been excluded from List II. The dominant position of the Central Legislature with regard to matters in List I and List III is thus established. But the rigour of the literal interpretation is relaxed by the use of the words "with respect to" which as already pointed out only signify "pith and substance", and do not forbid a mere incidental encroachment. But even if such an incidental encroachment may be ordinarily permissible, the field may not be clear. There may be competency and yet repugnancy also. The question is how to prevent a clash if the trespass is on a field already occupied by a Central Legislation.

The Negotiable Instruments Act.—There is in force a Central legislation, namely, The Negotiable Instruments Act, 1881, (Act XXVI of 1881) which deals with negotiable instruments, now specifically included in List I. S. 32 of this Act provides that in the absence of a contract to the contrary, the maker of a promissory note is bound to pay the amount thereof at maturity according to the apparent tenor of the note. Section 79 in more specific language lays down:

"When interest at a specified rate is expressly made payable on a promissory note or bill of exchange, interest shall be calculated at the rate specified, on the amount of the principal money due thereon, from the date of the instrument, until tender or realization of such amount or until such date after the institution of a suit to recover such amount as the Court directs."

Parties cannot even contract out of their statutory rights. Thus, in the case of a promissory note or bill of exchange, interest has to be calculated till at least the institution of the suit, at the rate specified therein. Any Provincial law providing that the interest prior to the suit should be curtailed or cut down, is *prima facie* in conflict with it. It will be trenching upon a field already occupied by S. 79.

After the Negotiable Instruments Act, came the Usurious Loans Act (Act X of 1918), as amended by Act XXVIII of 1926, which also was a Central Act. Now usurious loans undoubtedly come within "money-lending", which is specifically included in List II. As pointed out by me in the U. P. Regularization of Remissions Act case, an earlier Act can be modified, by necessary implication, by the provisions of a later Act. The Negotiable Instruments Act must therefore be read along with the Uusrious Loans Act, as well as any Provincial law on the subject that existed in March 1937, and they all taken together constitute the existing Indian law on the subject of negotiable instruments. Under S. 3 of the later Act where (*a*) interest is excessive, or (*b*) the transaction is substantially unfair, a court is empowered to reopen the transaction and relieve the debtor of his liability for excessive interest, in spite of any contract or agreement. But there are two provisoes: The court cannot (i) reopen an agreement which is more than 12 years old,

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or (ii) do anything which affects any decree of a court. There was also protection given to a *bona fide* transferee for value. The combined effect of the two enactments was that where the interest was excessive or the transaction was substantially unfair, a court could go behind the rate of interest entered in a promissory note, reopen the transaction and disallow all excessive interest up to 12 years earlier, but could not go behind a decree passed on a promissory note. As pointed out by me in the U. P. Case, referred to above, the effect of S. 292 of the Government of India Act, is not only to ensure that the existing Indian laws were not repealed, but actually to continue them in force until altered, repealed or amended by a competent Legislature. And a Provincial Legislature is not competent to alter, repeal or amend any law with respect to matters falling in List I. It follows that a Provincial legislation cannot nullify any such law.

The impugned Act permits the reopening of a final transaction evidenced by a promissory note even beyond a period of 12 years. It also enables a court to reopen a decree already passed and to modify it. It is not a mere case where the Provincial Legislature has fixed limits for testing the excessiveness of interest, enabling a court to reduce the interest according to a prescribed scale, whether or not the interest is in its own opinion excessive, and whether or not the transaction in its own opinion is substantially unfair. Nor is it a case where only *pendente lite* interest is scaled down, nor even a case where the provisions apply to a suit in which a decree is to be passed in future. Nor does it even protect *bona fide* holders in due course. Had the provision been confined to the interest after the suit was filed, there would have been no such conflict. Interest *pendente lite* is in the discretion of the court under S. 34 of the Civil Procedure Code, and the court's power to allow it is left untouched by S. 79 of the Negotiable Instruments Act. It draws no distinction between the original promisee and a holder in due course. The special hardship that would be inflicted on the latter is not at all taken into account in the Act and the special protection given to *bona fide* holders in due course by the Negotiable Instruments Act read with the Usurious Loans Act is destroyed. Had it been confined to the scaling down of the interest before a decree is passed, it might have come within the modification introduced by the Usurious Loans Act. But it affects decrees previously passed on promissory notes, which could not have been touched at all under the existing Indian laws in Madras. It is thus not a case where the power of a Provincial Legislature *eo nomine* in the absence of any Central legislation is to be considered, but a case where such legislation actually exists and already occupies the field.

Decree.—The Advocate-General of Madras has strongly urged before us that this is a case where the debt due on a promissory note had merged in a decree long before the impugned Act came into force, and that we must accordingly confine our attention to the facts of this particular case. His contention is that before the Act came into force the matter had passed beyond the domain of promissory notes into that of a decree, or as he put it " contract

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by record", and that so much of the impugned Act as relates to a decree of the court cannot be said to be in conflict with any provisions of the Negotiable Instruments Act, and must therefore be upheld. The judgment of the High Court is not based on any such ground.

Now S. 8, sub-s. (1) provides for the discharge of interest "whether the same be payable under law, custom or contract or under a decree of court and whether the debt or other obligation has ripened into a decree or not." Sub-s. (2) provides for the discharge of the principal in a certain case. These sub-sections are substantive provisions which alter the terms of the contract and the decree, whether passed before or after the Act. S. 19 enjoins upon a court the duty of reopening a decree, although passed before the impugned Act, and provides that on application made, the court "shall........apply the provisions of this Act to such decree and shall notwithstanding anything contained in the Code of Civil Procedure, 1908, amend the decree accordingly or enter satisfaction, as the case may be." S. 8 has the effect of extinguishing the interest on a debt whether it "has ripened into a decree or not." It applies equally to decrees that were passed before the commencement of the Madras Act as well as to those to be passed thereafter. On the other hand, S. 19 prevents a Court from seeking shelter behind the finality of a decree already passed, and makes it obligatory on the court to amend it, so as to make it accord with the provisions of S 8. This is compelling it to pass almost a fresh decree.

Taking all the provisions together particularly S. 8 it is very difficult to sever and split up the contract of the loan and the decree passed by a court on the basis of it. It seems to me that the two are inextricably mixed up together and indissolubly connected. S. 8 treats the liability as a debt wholly irrespective of the fact whether it is a decretal debt or not. I do not read these provisions as indicating that even if the contract could not be interfered with, the decree can be amended. It rather seems to me that both the contract and the decree obtained on it hang together and must stand or fall together so far as the Lists go.

Their Lordships of the Privy Council have laid down in several cases that part of an Act can be held valid and another part invalid, if they are severable. "If the offending provisions are so interwoven into the scheme that they are not severable," the whole is *ultra vires* : *In re., the Initiative and Referendum* Act[1]. In *Attorney-General for British Columbia* v. *Attorney-General for Canada*[2] their Lordships found "the whole texture of the Act so inextricably interwoven" that one part could not be contemplated as existing independently of the other. In *Shyamakant Lal* v. *Rambhajan Singh*[3] I had relied on these cases and pointed out that "It is a well-established principle that if the invalid part of an Act is really separate in its operation from the other parts, and the rest are not inseverably connected with it, then only such part

1. (1919) A.C. 935 at p. 944.
2. (1937) A.C. 377 at p. 388.
3. (1939) F.C.R. 193, at 213.

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is invalid, unless of course the whole object of the Act would be frustrated by the partial exclusion. If the subject which is beyond the legislative power is perfectly distinct from that which is within such power, the Act can be *ultra vires* in the former, while *intra vires* in the latter." But I am not aware of any case in which the same section containing similar provisions for contract as for the decree based on it has been considered to be severable so as to make the latter valid, while the former is invalid.

Obviously, the main object of the Madras Legislature was to relieve the agriculturists of their liability to pay excessive interest. This was an interference with the contract between the parties. The method adopted for achieving this object was to declare that the interest shall be deemed to be discharged in certain cases, whether a decree has been passed or not, and then to compel courts to amend the decree if already passed. Now if the Provincial Legislature had no power to amend the contract evidenced by the promissory note, so as to deprive the promisee of his right to recover interest due under it, it seems to me that it could not exercise the same power in an indirect way by providing that the court should not pass a decree for such interest, or that if once a decree is passed, the decree should be amended so as to deprive him of that interest. If a legislature has no power to enact that interest should be cut down before a decree comes to be passed, it would be anomalous to assume that nevertheless it has power to cut down interest from a decree already passed. "It is a very familiar principle that you cannot do that indirectly which you are prohibited from doing directly." *Madden* v. *Nelson and Fort Sheppard Railway*[1] and *Board of Trustees of Lethbridge Irrigation District* v. *Independent Orders of Foresters*[2].

It seems to me that where a court is bound by a statute to amend a decree and alter the amount due under it which it would not otherwise have power to do there is an interference with the powers of that court, if not of its jurisdiction. Legislatures in India have no authority to interfere with the jurisdiction and powers of courts, except with respect to matters coming within their Lists. Entries No. 53 of List I, No. 2 of List II and No. 15 of List III make that perfectly clear. If a legislature is not competent to deal with a subject matter, then it is equally incompetent to affect the jurisdiction and powers of the court with respect to that matter. If this were not so, the result would be that even though a legislature may have no power to legislate directly on a particular subject embracing a pecuniary liability, it could indirectly legislate that when the dispute comes in a court, the decree should be passed in a particular way, or a decree already passed should be amended in that way. This would introduce a serious anomaly and would enable legislatures freely to encroach upon other fields indirectly, and at the same time effectively.

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1. (1899) A.C. 626, at pp. 627-628. 2. (1940) A.C. 513 at p. 534.

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In *Ramnandan Prasad* v. *Kulpati Goshwami Madhwanand Ramji*[1] I have expressed the opinion that the provision in S. 11 of the Bihar Money-Lenders Act (III of 1938) that " no court shall.... pass a decree for an amount of interest, etc.", affected the powers of courts. In the Bihar case, *Lachmeshwar Prasad Shukul* v. *Keshwar Lal Chowdhuri*[2], decided today, also, I have expressed the opinion that the same provision in the corresponding S. 7 of the Bihar Money-lenders (Regulation of Transactions) Act (VII of 1939) does affect the powers of a court. Similarly, in the present case I am of the opinion that the provision in S. 19 that a court " shall .... apply the provisions of this Act to such decree........ amend the decree accordingly or enter satisfaction," does affect the powers of the court. Obviously, it is not a mere matter of simple procedure or method.

S. 8 contains a substantive provision directly depriving a creditor of a part of his debt. As in a case where twice the amount of the principal had already been paid by way of interest previously, even the outstanding amount of the principal is to be completely wiped out, the intereference is not only with the claim for interest, but for the principal sum as well. It is not "a matter included in the Code of Civil Procedure," as mentioned in List III, No. 4. S. 19 enjoins upon the court the duty of giving effect to those provisions where a decree has already been passed. It is really not an independent provision but a necessary consequence of S. 8, which applies both to a simple debt and debt due " under a decree " whether the debt " has ripened into a decree or not." In my opinion if a legislation is ' with respect to decrees passed on promissory notes' then it is necessarily also 'with respect to promissory notes."

I am accordingly unable to split up and separate the provision of law with regard to decrees from the provision of law with regard to debts. In my opinion the former is inseparable from the latter and the power to deal with it is dependent on the existence of the power to deal with the latter, except for repugnancy. Further the latter provision is in direct conflict with the provisions of the Negotiable Instruments Act, read with the Usurious Loans Act, and therefore amounts to an undoubted trespass on a field already occupied by an existing Indian law with respect to negotiable instruments.

Repugnancy under S. 107.—While in Canada the solution where a repugnancy exists is mostly a judge-made law, in the Indian Act the principle is embodied in S. 107, which in the event of repugnancy in certain cases makes the law of the Central Legislature prevail over that of the Province, even though there would be competency if there had been no such Central legislation. It has been suggested by the Advocate-General of India that by virtue of the provisions contained in S. 316 of the Act " a Federal Law " referred to in S. 107 (1) should include " an existing Indian law " on a subject which falls within List I. His point is that the expression " which the Federal Legislature is competent to enact " merely means a subject in List I

1. (1940) 3 F.L.J. 1 at p. 5. 2. (1940) 3 F.L.J. 73.

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and that it applies to all previous laws of the Central Legislature and is not necessarily confined to laws of the Indian Legislature passed after the coming into force of the Government of India Act. This contention if accepted, would raise several difficulties. According to strict grammar, the present tense " is competent to enact " would not necessarily mean 'had been or was competent to enact.' Further more, the existing Indian law with respect to matters enumerated in the Concurrent List, is expressly mentioned as an alternative to " Federal Law." There is therefore no point in saying that Federal law, which the Federal Legislature is competent to enact, means an existing law on a subject in Lists I and III. The learned Advocate-General of India is therefore compelled to urge that it refers only to matters in List I ; but such an argument would not be convincing as the words " competent to enact " undoubtedly cover matters both in Lists I and III.

Federal Law.—An examination of the language employed in S. 316 points to the conclusion that the " Federal law " must mean law passed by the Federal Legislature, or before Federation comes into being, passed by the Indian Legislature after the coming into force of the Act, and does not refer to the Indian laws which existed prior to the Act. In S. 311 " Provincial law " is defined as meaning an Act passed or law made by a Provincial Legislature established under this Act, and the expression " existing Indian law " means any law made before the commencement of Part III of the Act by any competent legislature, no matter whether the Central or a Provincial Legislature. The latter thus includes all the laws that were in existence at the time of the coming into force of the Government of India Act, no matter whether they had been made by the then Central or Provincial Legislatures. What S. 316 lays down is that the powers conferred by the Act on the Federal Legislature shall be " exercisable " by the Indian Legislature, and references to the Federal Legislature and the Federal laws shall be construed as references to the Indian Legislature and laws of the Indian Legislature. The expression " The powers ...... shall be exercisable, etc.," obviously implies the exercise of such powers in the future. That has no reference to Acts passed previously in the exercise of powers that existed before the Act came into force, for they come within the category ' existing Indian law.' It is obvious that " the powers conferred by the provisions of this Act " cannot " be exercisable by the Indian Legislature " unless the occasion arises after the Act has come into force. It follows that the first portion of S. 316 necessarily and unmistakably refers to Acts which are to be passed thereafter. The second portion begins with the words " and accordingly." The significance of these words is that the second portion of S. 316 is consequential, that is to say, is the result of the exercise of the powers conferred by the provisions of this Act. So that it again follows that this later provision also must refer to the laws of the Indian Legislature which in future come to be enacted by the Indian Legislature, in the exercise of the powers conferred by this Act on such Legislature. Three different kinds of expressions have been used in the Act, *viz.*, " Federal law ", " existing Indian law "

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and "laws of the Indian Legislature." There is absolutely no reason to suppose that Federal law was intended to include any part of the existing Indian law. I am accordingly unable to see that there is anything in the language of S. 316 which would make the expression "Federal law" in S. 107 (1) include a previously existing Indian law on a subject falling in List I. Of course, if there were a fresh enactment by the Indian Legislature after Part III has come into force and before the Federation comes into existence, then the provisions of S. 107 (1) would certainly apply to it.

For purposes of the transitional period, one may paraphrase the sub-section as meaning "if any provision of a Provincial law made by a Provincial Legislature established under this Act is repugnant to any provision of any laws of the Indian Legislature made after Part III has come into force, which the Indian Legislature is competent to enact etc." It follows that so far as the old law is concerned, it is only the latter portion of the sub-section which can, if at all, apply to it. But this portion is restricted to provisions of an existing Indian law with respect to one of the matters enumerated in the Concurrent List, and does not at all refer to any existing Indian Law with respect to one of the matters enumerated in the Federal List. If the matter were one falling within the Concurrent List, then the repugnancy is cured completely by the assent of the Governor-General obtained subsequently.

It seems at first sight strange that S. 107 should be incomplete as regards the existing Indian laws, and that provisions of repugnancy aiming at the removal of an inconsistency between Federal and Provincial laws should be unnecessarily restricted and should leave a gap. After Federation has come into force, or even after the Indian Legislature has re-enacted any old law, the difficulty may perhaps disappear. This would be so, if the words "with respect to one of the matters enumerated in the Concurrent List." were held to qualify only "an existing Indian law" and not "a Federal law" mentioned earlier. This would be putting a liberal interpretation so as to make the Provincial law, which is repugnant to a Federal law in respect of a matter in List I or List III, void to that extent. But S. 107 (1), as it stands, does not apply to the case where there is a repugnancy between a Provincial law enacted after the Act came into force, and an existing Indian law made prior to the Act, but falling within List I. If there were no other restriction on the power of the Provincial Legislature, the result would be that while the Provincial Legislature would not be competent to make a Provincial law repugnant to an existing Indian law relating to the Concurrent list, it would have almost a free hand to encroach upon the field of List I, regardless of the provisions of all the existing Indian laws. Such an untoward result could not have been contemplated. If it was necessary to impose drastic restrictions on the power to legislate with regard to the Concurrent List, where the whole field is open to a Provincial Legislature, it would be all the more necessary to impose even more drastic limitations on the powers of a Provincial Legislature to make legislation repugnant to the

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existing Indian law with respect to matters which have been expressly taken out of the authority of the Provincial Legislature. The principle of repugnancy embodied in S. 107 was presumably borrowed from the trend of decisions in Canadian cases, and might have been borrowed in full, so as not to leave a gap. But even if this sub-section is not comprehensive, it does not follow that there is any gap which cannot otherwise be filled up. Apparently it was thought that as the Provinces had not been given any authority to legislate with respect to matters falling in List I, all cases where there is an encroachment would be met by S. 100 itself.

Unoccupied Field.—The doctrine which has been evolved with regard to the Canadian cases is that if the encroachment is merely incidental, then there is no defect so long as the trespass is upon an unoccupied field. Engrafted upon the doctrine of incidental encroachment there is the further doctrine of unoccupied field. In *Attorney-General of Ontario* v. *Attorney-General for the Dominion of Canada*[1], the Lord Chancellor observed : " They would observe that a system of bankruptcy legislation may frequently require various ancillary provisions for the purpose of preventing the scheme of the Act from being defeated. It may be necessary for this purpose to deal with the effect of executions and other matters which would otherwise be within the legislative competence of the provincial legislature. Their Lordships do not doubt that it would be open to the Dominion Parliament to deal with such matters as part of a bankruptcy law, and the provincial legislature would doubtless be then precluded from interfering with this legislation inasmuch as such interference would affect the bankruptcy law of the Dominion Parliament. But it does not follow that such subjects, as might properly be treated as ancillary to such a law and therefore within the powers of the Dominion Parliament, are excluded from the legislative authority of the provincial legislature when there is no bankruptcy or insolvency legislation of the Dominion Parliament in existence."

In *Grand Trunk Railway of Canada* v. *Attorney-General of Canada*[2], Lord Dunedin observed that the earlier cases seemed to establish two propositions : " First, that there can be a domain in which provincial and Dominion legislation may overlap, in which case neither legislation will be *ultra vires*, if the field is clear ; and, secondly, that if the field is not clear, and in such a domain the two legislations meet, then the Dominion legislation must prevail."

In *Attorney-General for Canada* v. *Attorney-General for British Columbia*[3], Lord Tomlin when dealing with the question of conflict between the jurisdictions of the Parliament of the Dominion and the provincial jurisdiction, laid down four propositions as a result of the previous decisions of their Lordships, the last two being : " It is within the competence of the Dominion Parliament to provide for matters which, though otherwise within the legislative competence of the Provincial legislature, are necessarily incidental to effective

1. (1894) A.C. 189 at pp. 200-201.
2. (1907) A.C. 65, at p. 68.
3. (1930) A.C. 111 at p. 118.

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legislation by the Parliament of the Dominion upon a subject of legislation expressly enumerated in S. 91," and "There can be a domain in which provincial and Dominion legislation may overlap, in which case neither legislation will be *ultra vires* if the field is clear, but if the field is not clear and the two legislations meet the Dominion legislation must prevail."

In *Board of Trustees* v. *Independent Orders of Foresters*[1], the Lord Chancellor, declining to put a 'restricted interpretation' on the term "interest", observed "Even if it could be said that the Act relates to classes of subjects in S. 92 as well as to one of the classes in S. 91, this would not avail the appellants to protect the Provincial Act against the Interest Act of 1927, passed by the Dominion Parliament, the validity of which, in the view of their Lordships, is unquestionable..........Dominion legislation properly enacted under S. 91 and already in the field must prevail in territory common to the two Parliaments."

In *Jai Gobind Singh* v. *Luchmi Narain Ram*[2] where the amount due on an earlier promissory note, had formed part of the mortgage money, I distinguished the case by pointing out that the suit being on a mortgage the field was apparently clear, and therefore the question of interfering with the interest due on the promissory note did not directly arise.

No Canadian case has been cited before us in which although the subject of legislation was substantially within S. 92, it not only incidentally encroached upon a subject mentioned in S. 91, but at the same time actually clashed with an existing Dominion Legislation. The principles laid down by their Lordships have gone only so far as to permit an incidental encroachment, provided the Dominion field is unoccupied. In no case so far decided have their Lordships tolerated a trespass as well as a clash. If a clash with the Dominion legislation were also allowed, then a Provincial Legislature would be in a position, though indirectly, to nullify the Dominion legislation, even inside the field exclusively open to the Dominion, which would make the position intolerable.

It seems to me that the principles of interpretation laid down by their Lordships in the Canadian cases cannot be brushed aside by simply saying that they relate to a different Constitution. Those principles are not only of the greatest weight but must be a guide to us even in interpreting the Indian Constitution. Of course, we cannot interpret the language of any section in the Indian Act in the light of the interpretation of the corresponding section in the Canadian Constitution. That has to be avoided; but the principles of interpretation that have been established cannot be ignored. At the same time it would be dangerous to import only a part of the doctrine and exclude another part. Partial application may frustrate the very object for which the rule of law was deduced. The two doctrines of incidental encroachment and unoccupied field are closely related. I would go further

1. (1940) A.C. 513 at p. 531-532=3 F.L.J. 27 at 33 (P.C.).
2. (1940) 3 F.L.J. 46 at p. 51.

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and say that they are indissolubly connected. We cannot import the doctrine of incidental encroachment in favour of the Provinces, and refuse to import the doctrine of unoccupied field which is in favour of the Centre. The two must go hand in hand. To allow Provincial legislatures to encroach upon the exclusive Federal field, even though in an indirect way, when there is a Central legislation already occupying the field, would be to give the former a free hand in nullifying Central Acts relating to matters in the Federal List. Such a *carte blanche* could hardly have been contemplated. The scheme of S. 100 of the Act is to exclude completely from the authority of the Provincial Legislature the power to legislate with respect to subjects in List I. If in consequence of certain difficulties that Provincial Legislatures would experience by a rigid enforcement of such an exclusion we must in interpreting the words " with respect to " import the Canadian doctrine of permissibility of incidental encroachment, we must then at the same time import the other allied doctrine also that such an encroachment is permissible only when the field is actually unoccupied. It is only in this way that actual clash between the Centre and the Provinces can be avoided, which I think we must. This will also explain the apparent gap in S. 107 (1) of the Act, that gap being filled in by the provisions of S. 100.

The result is that the effect of Ss. 8 and 19 of the Madras Act is to compel courts to re-open decrees passed on the basis of promissory notes before the Act came into force, and recalculate the amounts due on them disallowing all interest outstanding on 1st October, 1937, and even the principal if double the amount has already been paid by way of interest ; while the Negotiable Instruments Act even read with the Usurious Loans Act, enjoins that interest should be calculated at the contract rate, and no court should cut down such interest if a decree has already been passed. In my opinion the Provincial Act being repugnant to the existing Indian law relating to promissory notes, which is exclusively a Federal subject, is void to that extent.

I however agree with the High Court that there is nothing in the Madras Agriculturists' Relief Act which really conflicts with any provision of the Hindu law. No doubt, a creditor can always fall back upon the original consideration, and sue upon the debt independently of the promissory note. It is, equally true that the sons were impleaded in this case merely to deprive them of the chance of contending that it was not binding upon them on account of its having been tainted with immorality or illegality. A Hindu son is under a pious obligation to pay his father's debts out of the joint family property. But he is not bound to pay what his father cannot be made to pay. If the interest on the loan taken by the father can be cut down under some existing law so as to benefit the father, the son can equally take advantage of that relief.

I also agree that any repugnancy to the Contract Act is cured by the assent of the Governor-General ; and further as usurious loans come within money-lending, any conflict with the Usurious Loans Act alone is not material.

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But for his erroneous conclusion as to the *intra vires* character of the Madras Act, re-affirmed by the Full Bench decision of the Madras High Court, the Subordinate Judge would have had no jurisdiction to interfere with the decree; and so his order for the satisfaction of the decree, when in fact it had not been satisfied, amounted to acting with an illegality in the exercise of his jurisdiction. The High Court could therefore appropriately exercise its discretion to interfere in Revision.

I would allow the appeal and remit the case to the High Court with the declaration that the order of the Subordinate Judge, dated the 11th February, 1939, be set aside, and the execution allowed to proceed.

Varadachariar, J.—The constitutional question arising for decision in this appeal relates to the validity of the Agriculturists' Relief Act, 1938 (IV of 1938), passed by the Madras Legislature. The learned counsel for the appellant, while contesting the validity of the impugned legislation, conceded that it was a genuine and *bona fide*, though drastic, attempt at a solution of the problem of agricultural indebtedness which has long been recognised as a pressing problem in this country. The Usurious Loans Act passed by the Indian Legislature in 1918 only conferred certain *discretionary* powers on the court, and its operation was not limited to agriculturists; it proved ineffective to check the growing burden of rural indebtedness. Recommendations for more drastic measures were made from responsible quarters, but no further action was taken by the Indian Legislature. The inclusion of "money-lending and money-lenders" in List II of Schedule VII to the Constitution Act justifies the inference that provincial legislatures must have been considered better fitted to deal with the subject with adequate knowledge of local conditions and requirements. Both before and after 1935, the local legislatures in the several Provinces have enacted more drastic measures for the purpose. The common feature of these measures was that they *compelled* the court to reduce substantially the *rate* of interest recoverable from a debtor and limited the total *amount* of interest recoverable on any loan to a sum equal to the principal amount, on the analogy of the *Damdupat* rule. The classes of cases in which relief was available under these enactments varied from Province to Province. Under the Madras Act in question, relief was afforded to all persons falling within the definition of "agriculturist" given in the Act and if they were agriculturists, they were entitled to invoke the protection given by the Act, in respect of all liabilities falling within the definition of "debt" given in the Act. It is noteworthy that even decrees passed before the date of the Act and decrees for money not arising out of loan transactions were directed by the Act to be reopened, with a view to give the judgment-debtor the benefit of the Act. Certain classes of debts were excluded from the operation of the Act, but no exception was made in respect of debts due under promissory notes or other negotiable instruments.

On the question of the validity and effectiveness of the Act, several possible views have been suggested in the course of the arguments or have

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emerged therefrom. On the one side, there is the view that the Act is valid in its entirety and is operative in respect of all kinds of debts as defined in the Act. This was the view taken by a Full Bench of the Madras High Court; and the learned Advocate-General of Madras, who intervened in this Appeal, naturally supported that view. On the other side, there is the extreme view that the Act is wholly invalid. The learned Advocate-General for India, who appeared for the appellant, put forward this view as a possible contention, but he did not seriously press it. Between these two extremes, two other views were suggested; (1) that the Act was *ultra vires* or void so far as its provisions were calculated to affect certain classes of debts, particularly those evidenced by promissory notes or other negotiable instruments, or (2) that the Act should, as a matter of interpretation, be so construed as not to affect these classes of debts. Dealing with a similar enactment in Bihar, a Division Bench of the Patna High Court recently held that a relieving provision in that Act couched in very wide and general terms could not affect the rights conferred by the Negotiable Instruments Act on the holder of a promissory note or other negotiable instrument, including the right to recover full interest as per terms of Ss. 79 and 80 of that Act. [See *Sagarmal* v. *Bhuthu Ram*[1]]. With reference to these intermediate views, a further question was raised and discussed before us, namely, whether the liability of the respondent in the present case was or was not such as could be validly reduced by an enactment of the Provincial Legislature.

In dealing with the questions above stated, the Madras Full Bench and the Advocate-General of Madras (in his arguments before us) relied on certain principles of interpretation laid down by the Judicial Committee in decisions relating to similar questions raised under the British North America Act. In the Patna High Court, more than one learned Judge has strongly protested against importing these principles—particularly what is described as the "pith and substance" rule—into the construction of the Government of India Act; and in *Sagarmal's* case, Meredith, J., observed: "there are peculiar provisions in S. 100 of the Government of India Act and in my view they bar the application of the pith and substance principle to that Act." It must always be in the discretion of each Judge to decide for himself how far he can or will accept help and guidance from precedents; but the note of caution sounded by my Lord the Chief Justice in his judgment in the *Central Provinces case*[2] as to the application "without qualification" of precedents relating to federal and provincial powers under other systems cannot reasonably be interpreted as altogether banning their use. It seems to me necessary to point out that the assumption in the Patna case that the scheme of S. 100 of the Constitution Act is radically different from that of Ss. 91 and 92 of the British North America Act is not warranted. A long line of decisions beginning at least as early as *Citizens Insurance Company of Canada* v. *Parsons*[3]

1. (1940) 3 F.L.J. H.C. 119.
2. (1939) F.C.R. 18 at p. 38.
3. (1881) 7 A.C. 96.

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have interpreted these provisions of the Canadian Constitution in a manner that almost assimilates their scheme to that adopted in S. 100 of the Government of India Act. There is of course no elaborate Concurrent List in the British North America Act corresponding to List III of Schedule VII to the Government of India Act and the grant of *general* legislative power to the Dominion Parliament by the opening words of S. 91 has obviated the necessity for a provision like that made in S. 104 of the Government of India Act to meet unforeseen contingencies. But as regards the distribution of powers between the Centre and the Provinces, the relation between Ss. 91 and 92 of the British North America Act is according to the decisions substantially the same as that indicated in S. 100 of the Constitution Act between Lists I and II of the Seventh Schedule. The position under the Canadian Constitution was described by Viscount Haldane in *John Deere Plow Co.* v. *Wharton*[1] in the following words: "The general power conferred on the Dominion by S. 91 ...... extends in terms only to matters not coming within the classes of subjects assigned by the Act exclusively to the Legislatures of the Provinces. But if the subject-matter falls within any of the heads of S. 92, it becomes necessary to see whether it also falls within any of the enumerated heads of S. 91, for, if so, by the concluding words of that section it is excluded from the powers conferred by S. 92." The position of the Provincial Legislatures under the Indian Constitution Act in respect of the subjects enumerated in List II and in relation to the subjects specified in List I is in essence the same as that above stated in regard to the powers of the Provincial Legislature under S. 92 of the British North America Act. It will be clear from the decisions that the rules of interpretation adopted in the Canadian cases were evolved only as a matter of reasonableness and common sense and out of the necessity of satisfactorily solving conflicts arising from the inevitable overlapping of subjects in any system of distribution of legislative powers. That they need not be limited to any special system of federal constitution is made clear by the fact that in *Gallagher* v. *Lynn*[2], Lord Atkin applied the "pith and substance" rule when dealing with a question arising under the Government of Ireland Act—which did not embody a federal system at all—and in *Shannon* v. *Lower Mainland Dairy Products Board*,[3] when dealing with a Canadian case, he embodied in the judgment the principles enumerated in the Irish Case.

That the subject-matter of the impugned legislation is to a certain extent at least within the jurisdiction of the Provincial Legislature cannot be and has not been denied. It may be that it will fall partly under one item and partly under another item in List II or List III. For instance, some of the debts affected by the Act may fall under the heading of "trade" and some under the heading of "money-lending" in item 27. Support may in some instances be also derived from item 10 (relating to contracts, etc.) and item

1. (1915) A.C. 330 at p. 337.
2. (1937) A.C. 863 at p. 869.
3. (1938) A.C. 708 at pp. 719, 720.

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14 (relating to actionable wrongs) in List III. In the Madras Full Bench judgment, the learned Chief Justice expressed the opinion that the Act might also be regarded as one relating to *agriculture*. This is perhaps open to question, on the ground that "agriculture" in item 20 of List II must be understood as signifying only the process of agriculture (though other allied matters are brought in by a kind of inclusive enumeration) and cannot comprehend a subject like agricultural indebtedness merely because the relief of such indebtedness may contribute to the prosperity and efficiency of agriculture. The decision of the Judicial Committee in *Attorney-General for Canada* v. *Attorney-General for British Columbia*[1] putting a limited interpretation upon the reference to "fisheries" in S. 91 of the British North America Act may lend some support to this principle of strict interpretation of the term "agriculture." But it is unnecessary at this stage to consider whether all conceivable kinds of debts falling within the definition in the Madras Act can or cannot be brought under one or other of the heads in Lists II and III, because that has not been the line of attack adopted by the learned counsel for the appellant. The objection to the impugned Act, in whatever form urged was based on the fact that List I of the Seventh Schedule to the Constitution Act reserves cheques, bills of exchange, promissory notes and other like instruments for the exclusive competence of the Federal Legislature (item 28). Though the Madras Act does not in terms purport to deal with negotiable instruments, debts due under such instruments will undoubtedly fall within the definition of "debts" in the Act. The question for consideration, therefore is whether this inclusion of debts due under negotiable instruments has rendered the Act wholly or in part invalid or inoperative.

The argument of *total* invalidity need not be dealt with at any length, not only because it was not seriously pressed, but also because there is little force in it. If an enactment deals in part with matters beyond the competence of the Legislature which enacted it, it must be held to be wholly invalid only in cases where the valid and invalid provisions are inseparably intermixed or the innocent provisions are merely ancillary to the offending provisions. This cannot be said to be the position in the present case. Further as there is no provision in the Act dealing *in terms* with negotiable instruments, any objection based on the wide scope of the Act may be obviated by so interpreting the *general* terms used in the Act as to limit them to cases with which alone the Legislature was competent to deal. (*See Macleod* v. *Attorney-General for New South Wales*[2]).

The Full Bench decision of the Madras High Court held that the Act is not invalid or inoperative even in respect of debts due under negotiable instruments, because in the opinion of the learned Judges it did not "really affect the principles embodied in the Negotiable Instruments Act." This statement seems to require qualification. It is of the essence of negotiation

1. (1930) A.C. 111. 2. (1891) A.C. 455 at p. 459.

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(as distinguished from a mere assignment) that a holder in due course must be able to recover the full amount due for principal and interest according to the apparent tenor of the document and he cannot be called upon to enquire whether the executant of the document or the person liable was an agriculturist or not. If this right is negatived, it cannot be said that the negotiability of the document has not been affected. The question will nevertheless remain, whether, notwithstanding this abridgment of the rights of the holder of a negotiable instrument, the legislation may not be valid and operative in its entirety according to the principles adopted in the decisions of the Judicial Committee in some of the Canadian cases. These cases recognize that even where provincial legislation contains provisions relating to subjects exclusively reserved for the Dominion Legislature, the whole enactment may be effective if the offending provisions are only incidental or if it is possible to regard a subject as falling under the dominion jurisdiction in one aspect and under provincial jurisdiction in another aspect and the impugned provincial legislation has been enacted in respect of the latter aspect. When it becomes necessary to decide this question, the effect of the decision in *Ladore* v. *Bennett*,[1] and its explanation in *Board of Trustees* v. *Independent Order of Foresters*[2], will fall to be considered. On the other hand, a different result might follow if, with reference to the observation of Viscount Haldane in *Great West Saddlery Co.* v. *The King*[3], it should be held that the items "trade and commerce", "money-lending and money-lenders" in List II and the item "contract" in List III are expressed in "general language while "cheques, bills of exchange, promissory notes" in item 28 of List I are "particular" items and "general language" in Lists II and III must yield to "particular expressions" in List I, where the latter are unambiguous. In the next succeeding sentence on the same page, their Lordships recognise that this rule may sometimes also apply in favour of the Provinces, for otherwise the purpose of assigning the *particular* item to the Province will be frustrated. It does not seem to me necessary for the purpose of this case to decide these questions, because the liability here sought to be reduced with the aid of the provisions of the Madras Act, had long before the date of the enactment of that Act passed into a decretal liability and was no longer one under a promissory note or other negotiable instrument.

For the same reason, it seems to me unnecessary to express a definite opinion on another contention of Sir. B. L. Mitter, namely, that the provisions of the impugned Act may also be void under S. 107 (1) of the Constitution Act, in so far as they are repugnant to the provisions of the Negotiable Instruments Act. The validity of this contention will depend upon the import of the expression "federal law" occurring in the opening part of sub-section (1) of S. 107. It may be conceded that the words "which the Federal Legislature is competent to enact" may refer to the first List also and they need not be qualified by the words occurring later and referring to the Concurrent

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1. (1939) A.C. 468.
2. (1940) A.C. 513.
3. (1921) 2 A.C. 91 at p. 116.

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Legislative List; because, if these later words were intended to qualifiy the opening words of the sub-section also, it would not have been necessary to use the words "which the Federal Legislature is competent to enact" in the earlier portion. In *Sagarmal's* case[1], Meredith, J., seems to take a different view. But as contended by the learned Advocate-General of Madras, the expression "federal law" would *prima facie* seem, on the wording of S. 316, only to comprehend legislation passed by the Indian Legislature *after* the Government of India Act of 1935 came into operation and not earlier enactments of the Central Legislature, like the Negotiable Instruments Act. The use of the word "accordingly" in S. 316 suggests that the second part of the first paragraph is consequential upon the first and as the first part clearly refers to the transition period—between the introduction of provincial autonomy and the establishment of the Federation,—it would seem to follow that the expression "laws of the Indian Legislature" in the second part refers to the laws passed by the Indian Legislature, while functioning as the "Federal Legislature" during the transition period. This construction would no doubt lead to an *apparent* anomaly in the operation of S. 107, *viz.*, that while provincial legislation in respect of subjects in the Concurrent List cannot override "existing Indian law" except when assented to by the Governor-General, such legislation in respect of subjects enumerated in List II may without any such safeguard override pre-existing enactments even of the Central Legislature if they relate to subjects specified in List I. It is however conceivable that the position might well have been left like this, because the danger of such interference by the Provincial Legislatures was small. A Provincial Legislature can, if at all, trespass on List I subjects *only* when it legislates (in fact and not merely colourably) on List II subjects; whereas in the case of List III subjects, the whole field is open to interference by the Provincial Legislature. But I refrain from expressing any final opinion on this question, as it is unnecessary for the purposes of this case to decide it.

It only remains to consider whether or not the claim of the appellant belonged to a category that could be affected by provincial legislation. The recitals in the promissory note on which the suit was instituted and the admissions made in paragraph 6 of the affidavit filed by the appellant's agent on 3rd October, 1938 in the Coimbatore Sub-Court in the present proceedings show that the appellant is a money-lender and the promissory note related to the balance due on account of previous money dealings between the parties. Apart from the existence of the promissory note, the case would clearly fall under the head "money-lending and money-lenders" in item 27 of List II. Under this head, it would probably make no difference in respect of the Provincial Legislature's power to deal with such a case that a decree had been passed in respect of the debt, because, the creditor would not be any the less a "money-lender" on that account. If there should be any doubt on this ground, it might be sufficient to read this head with item 2 in the same list (jurisdiction and powers of courts). Even if it should be found necessary

1. (1940) F.L.J.: H.C. 119.

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to call in aid the powers under the Concurrent List, on the ground that there was an interference with the provisions of the Civil Procedure Code relating to decrees, the precaution of obtaining the assent of the Governor-General under S. 107 (2) of the Constitution Act has been taken in this case. Sir B. L. Mitter was prepared to assume that the passing of the decree would not make any difference; but, on this basis, he contended that where the claim arose out of a promissory note, the matter must be regarded as falling under item 28 of List I (cheques, bills of exchange, promissory notes, etc.), even after a decree had been passed. I am unable to accede to this argument. A distinction may have to be drawn between decrees passed before the date of the Madras Act and decrees passed subsequent to that date. Assuming, for the sake of argument, that liabilities under negotiable instruments cannot be affected by provincial legislation, it would be anomalous to recognise in the Provincial Legislature a power to reduce the liability under such an instrument as soon as it merges in a decree. This will be permitting that Legislature to do indirectly what it cannot do directly and inviting every promisor to insist on a suit being filed on his note and then allowing him to avail himself of the benefit of the Act. The Madras Act under consideration does not present any such problem, because S. 19 is limited to decrees passed before the commencement of the Act. Where, as in the present case, that is the position, the provisions affecting the operation or effect of that decree cannot be said to relate to a negotiable instrument. The Act does not attempt to operate on the instrument and the right of the creditor at the moment of the commencement of the Act did not possess the incidents of a negotiable instrument, either as regards negotiability or as to the benefit of S. 79 of the Negotiable Instruments Act. Relying on the provision in S. 8 to the effect that the liability should be scaled down with reference to the "principal" amount, the learned counsel for the appellant contended that the Act itself treated the promissory note as still the basis of the claim. That does not seem to me to be the correct way of reading a provision which only lays down a method of *calculation* of the amount to which the decree is to be scaled down. The parties are not relegated to the position of "promisor" and "promisee". Nor does the provision in S. 19 as to the "amending" of the decree imply such restoration of the parties to their status before suit. The decree is re-opened only to the extent necessary to alter the amount payable. This is shown by the fact that in the same paragraph in S. 19, provision has also been made for "entering up satisfaction" if the amount payable as per the terms of the Act has been paid even before the date of the application under S. 19. There is accordingly no reason for holding that the impugned Act is invalid or inoperative so far as the subject-matter of the present proceedings is concerned. This appeal must therefore be dismissed. As the respondent has not appeared, there will be no order as to costs in the appeal.

By the Court.—In accordance with the decision of the majority of the Court, the appeal is dismissed. There will be no order as to costs.

[Appellate Jurisdiction.]

PRESENT :—SIR MAURICE GWYER, C.J., SIR SHAH SULAIMAN AND SIR S. VARADACHARIAR, JJ.

Raja Prithwi Chand Lall Choudhry .. *Appellant**

v.

Rai Bahadur Sukhraj Rai and Others .. *Respondents.*

AND

Subhanand Chowdhary & Another .. *Appellants.*

v.

Apurba Krishna Mitra & Another .. *Respondents.*

Federal Court—Practice—Review of judgment—Powers of—Principles on which exercised.

The Federal Court has made no rules for regulating applications for a review of its judgments. The rules which govern the practice of the Judicial Committee and of the House of Lords in these matters may rightly be taken as a guide to the practice of the Federal Court. Ordinarily there can be no rehearing upon the whole case and entire alteration of the judgment once pronounced. The power to review is to be exercised with extreme caution and only in every exceptional cases and applications for its exercise will not be encouraged.

Case-law discussed.

Rajeshwari Prasad instructed by *G. Sahay* for Appellant in Case No. XV of 1939.

Appellant appeared in person in Case No. XIII of 1939.

The Court delivered the following

JUDGMENT.—These are two *ex parte* applications for a review of judgments delivered by this Court on March, 18th last. They are the first applications of the kind which have come before us, and it is desirable that we should state the principles which the Court will take for its guidance in deciding them.

This Court will not sit as a Court of appeal from its own decisions, nor will it entertain applications to review on the ground only that one of the parties in the case conceives himself to be aggrieved by the decision. It would in our opinion be intolerable and most prejudicial to the public interest if cases once decided by the Court could be re-opened and re-heard : "There is a salutary maxim which ought to be observed by all Courts of last resort—*Interest reipublicae ut sit finis litium.* Its strict observance may occasionally entail hardship upon individual litigants, but the mischief arising from that source must be small in comparison with the great mischief which would necessarily result from doubt being thrown upon the finality of the decisions of such a tribunal as this." *Venkata Narasimha Appa Row* v. *Court of Wards.*[1]

This Court is not, it is true, a Court of last resort in the sense in which the Judicial Committee or the House of Lords may be so described in the United Kingdom ; but it is the highest tribunal sitting in this country and no appleal lies without leave from any decision given by it in the exercise of its appellate jurisdiction. The High Courts in British India have been given

* Case Nos. 15 and 13 of 1939. 14th October, 1940.

1. (1886) 11 A.C. 660 at p. 664.

a limited power to review their judgments by S. 114 of, and Order XLVII of the First Schedule to, the Civil Procedure Code. This Court has power under S. 214 (1) of the Constitution Act to make rules of Court for regulating generally the practice and procedure of the Court ; but it has made no rules for regulating applications for a review of its judgments, and in these circumstances it is unnecessary to consider whether its rule-making power is wide enough to enable it to assume a general jurisdiction for that purpose, in the absence of express statutory provisions such as are to be found in S. 114 of the Code. If at the present moment it has power to review its own judgments, that power should not in our opinion be regarded as more extensive than the power exercised for the same purpose by the Judicial Committee and should be subject to similar restrictions ; and we conceive that the rules which govern the practice of the Judicial Committee and of the House of Lords in these matters may rightly be taken as a guide to the practice of this Court also.

The practice in England is well-settled and of long standing. In *Rajunder Narain Rae* v. *Bijai Govind Singh*[1], Lord Brougham, delivering the judgment of the Judicial Committee, said :—" It is unquestionably the strict rule, and ought to be distinctly understood as such, that no cause in this Court can be re-heard, and that an order once made, that is a report submitted to His Majesty and adopted, by being made an Order in Council, is final and cannot be altered. The same is the case of the judgments of the House of Lords, that is, of the Court of Parliament, or of the King in Parliament as it is sometimes expressed, the only other supreme tribunal in this country. Whatever, therefore, has been really determined in these Courts must stand, there being no power of re-hearing for the purpose of changing the judgment pronounced; nevertheless if by misprision in embodying the judgments, errors have been introduced, these Courts possess, by common law, the same power which the Courts of Record and Statute have of rectifying the mistakes which have crept in. . . The House of Lords exercises a similar power of rectifying mistakes made in drawing up its own judgments, and this Court must possess the same authority. The Lords have, however, gone a step further, and have corrected mistakes introduced through inadvertence in the details of judgments ; or have supplied manifest defects in order to enable the decrees to be enforced, or have added explanatory matter, or have reconciled inconsistencies. But with the exception of one or two cases in 1669, of doubtful authority, here, and another in Parliament of still less weight in 1642 (which was an appeal from the Privy Council to Parliament, and at a time when the Government was in an unsettled state) no instance, it is believed, can be produced of a re-hearing upon the whole cause, and an entire alteration of the judgment once pronounced."

And, after giving instances in which the power of rectifying mistakes and errors had been exercised, he continued :—" It is impossible to doubt that the indulgence extended in such cases is mainly owing to the natural desire pre-

1. (1836) 1 Moo.P.C. 117.

vailing to prevent irremediable injustice being done by a Court of last resort, where by some accident, without any blame, the party has not been heard and an order has been inadvertently made as if the party had been heard."

In *Hebbert* v. *Purchas*[1], the respondent had petitioned for a re-hearing on the ground that the appeal had been heard *ex parte* because of his want of means to brief counsel and his own inability to argue the case, and also because the judgment of the Judicial Committee in the appeal was at variance with former decisions of the Committee; but the Lord Chancellor (Lord Hatherley), delivering the judgment of the Committee, said :—" Having carefully weighed the arguments, and considering the great public mischief which would arise on any doubt being thrown on the finality of the decisions of the Judicial Committee, Their Lordships are of opinion that expediency requires that the prayer of the petitions should not be acceded to, and that they should be refused with costs."

The general principle remains as it was enunciated a century ago. It is recognized by the Judicial Committee that in certain exceptional circumstances an application for a re-hearing may be entertained, but the cases in which this will be done have not been substantially enlarged since they were explained by Lord Brougham in the passage already cited, though Lord Watson, delivering the judgment of the Judicial Committee in *Srimantu Raja Yarlagaddu Durga* v. *Srimantu Mallikarjuna*[2] included cases where some misprision had occurred, " as for instance, the terms of the decree adjudicating something which had not been in the view of Their Lordships' Board, or which they had not had the means of deciding, or where the decree did not carry out the terms of the judgment." In no case however has any re-hearing been allowed upon the merits or even on the ground that new matter has been discovered, which, if it had been produced at the hearing of the appeal, might materially have affected the judgment of the Committee : *Venkata Narasimha Appa Row* v. *Court of Wards*[3].

We turn now to the facts of the two cases which are before us.

In the first case counsel for the appellant informed us at the original hearing that the only point which he desired to argue was the application of a certain section in an Act of the Bihar Legislature. This point had not been raised at any previous stage of the litigation and the particular section was not even mentioned in the petition of appeal. We saw no reason in these circumstances for giving leave to amend the petition, and the appeal was accordingly dismissed with costs. The application for review which was subsequently filed alleged that the appellant was prejudiced on account of the laches of the respondents in appearing and filing a statement of their case on the day of the hearing of the appeal. At the hearing of the application however counsel relied mainly upon another ground, *viz.*, that the judgment of the High Court on the application for a certificate

1. (1871) L.R. 3 P.C. 664. 2. (1891) I.L.R. 14 Mad. 439.
3. (1886) 11 A.C. 660; I.L.R. 10 Mad. 73.

under S. 205 of the Constitution Act was not produced before this Court when the appeal was heard. We have now seen the judgment of the High Court, the existence and indeed the terms of which must have been known to the parties or their advisers when the appeal was heard, and there is nothing in it which could be of the slightest assistance to the applicant. As to the alleged laches of the respondents, an appellant must succeed by the merits of his own case and not by the laches of his opponents ; and it is hard to see how the present applicant could have been prejudiced, since his appeal was dismissed without the respondents being called upon to argue the merits of the case. The applicant is in effect inviting this Court to re-hear his appeal upon the merits, because he thinks that the Court was in error in dismissing it. There is in our opinion no justification for the application and it should never have been filed.

In the second case the applicant appeared in person and submitted a written argument. He had been in the main successful on those points which were argued on the appeal, but he appears to be of opinion that the interest which he was ordered to pay on the reduced amount of his debt should have been fixed at a lower rate. He complained also of the conduct of his Agent in not communicating with him early enough with regard to the date when the appeal was to be heard and in applying to the Court too late for an adjournment. There may be some substance in his complaint against the Agent, but it is not a matter with which this Court can deal on the present application. He desired to take points which were not argued by his counsel at all in the High Court or this Court ; and he also alleged that his counsel was not properly instructed and so could not present his case fully at the hearing before us. If counsel had felt that he could not do justice to his client's case without a further study of his instructions, he would doubtless have asked for the indulgence of the Court ; but no such request was made, and it is a matter for counsel's discretion how a case is presented to the tribunal and which points are pressed or abandoned. This applicant also is asking us to re-hear the whole appeal upon the merits.

The power which we are invited to exercise in these two cases is one to be exercised with extreme caution and only in very exceptional cases ; and applications for its exercise will not be encouraged by this Court. Neither applicant has brought himself, even remotely, within any of the exceptions to the general rule. Both applications are dismissed ; and we think it right to say that future applications of the kind will run the risk of receiving more summary treatment.

K.S.

THE FEDERAL COURT OF INDIA.

[Appellate Jurisdiction].

PRESENT :—SIR MAURICE GWYER, C.J., SULAIMAN AND VARADACHARIAR, JJ.

Lachmeshwar Prasad Shukul and others .. *Applicants.**

v.

Keshwar Lal Chaudhuri and others .. *Respondents.*

Federal Court—Practice—Appeal—Change in law by supervening legislation since the judgment under appeal—Power to consider and apply.

Civil Procedure Code (V of 1908), O. 45, r. 8—Absence of an order by the High Court admitting the appeal to the Federal Court—Effect.

In an appeal questioning the validity of the Bihar Money-lenders Act (III of 1938), which has since then been repealed and replaced by Act (VII of 1939),

Held, that in the exercise of its appellate jurisdiction the Federal Court has power not only to correct any error in the judgment under review but to make such disposition of the case as justice requires. And in determining what justice does require the Court is bound to consider any change either in fact or in law, which has supervened since the judgment was entered.

Per *Sulaiman, J.*—Though the Court is not bound to apply the new Act it is not debarred from applying it.

Held further (Per *Sulaiman, J.*) So long as O. 45, r. 8, Civil Procedure Code, remains applicable to appeals to the Federal Court an appellant cannot come to the Federal Court without his appeal having been admitted by the High Court.

Per *Varadachariar, J.*—The provisions of O. 45, Civil Procedure Code were only procedural provisions and it was not necessary to hold that non-compliance with them in the High Court ousted the jurisdiction of the Federal Court when a certificate under S. 205 (1) of the Constitution Act had once been given.

Dr. Narain Prasad Asthana, Advocate-General, U. P. and *Raghbir Singh* instructed by *T. K. Prasad, Agent*, for the Appellants.

Sir B. L. Mitter, Advocate-General of India and *Major Surendro Pal Singh* instructed by *B. Banerjee, Agent*, for the Respondents.

Gwyer, C.J.:—In this case I find myself entirely in agreement with the judgment to be delivered by my brother Varadachariar, which I have had an opportunity of reading. I do not think it necessary therefore to deliver a judgment of my own ; but, with regard to the question whether the Court is entitled to take into account legislative changes since the decision under appeal was given, I desire to point out that the rule adopted by the Supreme Court of the United States is the same as that which I think commends itself to all three members of this Court. In *Patterson* v. *State of Alabama*[1], Hughes, C.J., said : " We have frequently held that in the exercise of our appellate jurisdiction we have power not only to correct error in the judgment under review but to make such disposition of the case as justice requires. And in determining what justice does require, the Court is bound to consider any change, either in fact or in law, which has supervened since the judgment was entered." This view of its powers was re-affirmed by the Court in a case decided as recently as March last : *Minnesota* v. *National Tea Co.*[2].

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*Civil Appeal Case No. III of 1940. 6th December, 1940.

1. (1934) 294 U.S. 600 at p. 607.
2. (1940) 309 U.S. 551, at p. 555.

Sulaiman, J.

Sulaiman, J.—The facts of the case are given in the judgment of my brother. I propose to consider separately a few points of law that have created difficulties.

As would appear from the orders passed by the Federal Court in this case on the 5th March, 1940 (formerly case No. 14 of 1939)[1], the High Court after granting a certificate under S. 205 (1) of the Act (Government of India Act, 1935), declined to extend the time for making the deposit, required by O. 45, r. 7, Civil Procedure Code, 1908, and therefore did not admit the appeal. The appellants were, however, excused by this Court from compliance with so much of O. 10, F. C. R. (Federal Court Rules) as required them to get the record prepared and printed in the High Court, and to lodge their petition of appeal within sixty days of the admission of the appeal by the High Court.

The Bihar Money-lenders Act (III of 1938) (read with Act V of 1938) was repealed and replaced by Act VII of 1939, which came into force in May of that year. Although the High Court did not declare the appeal admitted, the appellants lodged their petition of appeal in December, 1939, urging *inter alia* that S. 11 of the old Act was not void and that in any case, S. 7 of the new Bihar Act was applicable. They also raised a number of other grounds relating to the merits of the case. The plaintiffs filed a cross-appeal, which they have withdrawn. Without re-arguing the point, Sir B. L. Mitter, the Advocate-General of India, has "formally" objected to the appeal.

Competency of the Appeal.—The difficulty to be considered arises out of r. 17, which has been added to O. 45, Civil Procedure Code, by the Adaptation Order [Government of India (Adaptation of Indian Laws) Order, 1937]. The powers of the Judicial Committee are very wide, and the full and unqualified exercise of His Majesty's pleasure in receiving appeals to His Majesty in Council is expressly saved by S. 112 (1) (*a*), Civil Procedure Code. The Federal Court has no power to entertain an appeal by giving a special leave. S. 205 of the Act specifies the case when an appeal would lie to this Court. S. 293 of the Act provides for adaptations and modifications of existing Indian Laws by an Order in Council. The Adaptation Order has, with a few modifications, made O. 45, Civil Procedure Code applicable to Federal Court appeals.

As under S. 109, Civil Procedure Code, the right to appeal to His Majesty in Council can be modified only by an Order in Council, such an Order was issued on the 17th April, 1920, and deals with the procedure to be followed in the Indian High Courts, while the Judicial Committee rules, dated the 2nd May, 1925, deal with the practice in the Privy Council, as saved by S. 112 (1) (*b*), Civil Procedure Code. Under S. 214 (1) of the Act, the Federal Court has been given power to make rules for regulating generally "the

1. (1940) 3 F.L.J. 15.

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practice and procedure of the Court," and even under S. 109, read with S. 111 (A), Civil Procedure Code, it may in cases to which that section relates, have power to make rules ; but so far it has not made any express rules amending O. 45, Civil Procedure Code. On the other hand, in deference to the Adaptation Order, assuming it to be *intra vires*, the Federal Court also has by its own O. 9, r. 1, made O. 45, Civil Procedure Code, as modified and adapted, applicable to appeals to it. This O. 9, F. C. R., governs the procedure when the matter is still before the High Court. O. 10, F. C. R., which begins with the heading " Procedure after admission of appeal " deals really with the " practice and procedure " of the Federal Court. Rule 3 states that the petition of appeal is to be lodged in the Federal Court *after* " the admission of the appeal by the High Court appealed from."

One result of r. 17, having been added to O. 45, Civil Procedure Code, by the Adaptation Order is that when the only ground of appeal stated in the petition is a constitutional one, even then like proceedings, except the security for costs, are to be had thereon as if a certificate under O. 45, r. 3 had been granted. The deposit of the amounts required to defray the expenses of translating, transcribing, indexing and transmitting a copy of the record, and also of the amounts required to defray the expenses of printing such copy within the prescribed time, still remains necessary under r. 7. A necessary consequence is that under r. 8, the High Court after the deposit has been made to its satisfaction, has to " declare the appeal admitted ", and then "give notice thereof to the respondents", and to transmit the record to the Federal Court. The proceedings must be deemed to be pending in the Court, so long as there is a mere application for leave to appeal, even though the certificate required by S. 205 of the Act has been granted. But as soon as the required amounts have been deposited to the satisfaction of the Court, and the Court has declared the appeal " admitted ", the matter becomes open to the Federal Court. Indeed, the record is transmitted only after such admission of the appeal.

O. 45, Civil Procedure Code, itself shows the distinction between the two stages—before and after the admission of the appeal. Before the admission the Court may revoke the security and make further directions thereon (r. 9). But after the admission, if the security appears inadequate or further payment is required for the purpose of translating, transcribing, printing, indexing or transmitting the copy of the record, the court may order the appellant to furnish further security, or make further payments (r. 10), but if he fails, it can only stay proceedings and await the order of the Federal Court. This obviously implies that after the admission of the appeal, it has passed out of the absolute control of the High Court. R. 13 (1) also speaks of the grant of a certificate for the " admission " of an appeal.

This interpretation of O. 45, r. 8, Civil Procedure Code, is borne in mind in the Order in Council, dated the 17th April, 1920, which maintains the same distinction between the two stages. Under r. 8, an appellant who has obtained the certificate may at any time " prior to the making of an

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Order admitting the appeal" withdraw the appeal. Rule 9 also refers to a case where the appellant fails to apply with due diligence "for an Order admitting the appeal". Rules 10, 11 and 12 relate to an appellant "whose appeal has been admitted." Rule 13 refers to a period between "the admission of the appeal" and the despatch of the record, and in case of delay to "the appeal not being effectually prosecuted."

Similarly, the Judicial Committee Rules, 1925, maintain the same distinction. Rule 11 makes it incumbent on the appellant to take steps for the transmission of the record "as soon as the appeal has been admitted", requires the High Court Registrar to certify to the Registrar of the Privy Council that the respondent has received notice or is aware of "the Order of the Court appealed from admitting the appeal", and in case of failure, it is the Registrar of the Privy Council who calls for an explanation, and the appellant may have to show cause before the Privy Council. Under r. 29 the petition of appeal is to be lodged after the arrival of the record in England. Rule 30 requires that the petition of appeal should recite the principal steps in the proceedings "down to the admission of the appeal." Under r. 32, even if the appeal is desired to be withdrawn before the lodging of the petition of appeal, notice has to be given to the Registrar of the Privy Council and not direct to the Registrar of the High Court. Rule 43 also shows that the admission of the appeal is regarded as a crucial stage.

As already pointed out O. 10, F. C. R., also was intended to apply to the stage after admission of the appeal, and r. 3, requires the lodging of the petition of appeal after the "admission" of the appeal by the High Court.

It would therefore appear that the admission of the appeal by the High Court is its final judicial act, after which it must give notice of the appeal to the respondent. When the High Court has to be satisfied as to the sufficiency of the security, and that applies to all cases under O. 45, Civil Procedure Code, I am unable to hold that the declaration that the appeal is admitted is a mere ministerial or administrative act, and not a judicial one. Barring cases in which special leave may be granted by the Privy Council, it would be impossible for an appellant to go straight to the Privy Council, without his appeal having been admitted by the High Court. As there can be no question of any special leave for appeal being granted by the Federal Court, it would seem that so long as O. 45, r. 8, Civil Procedure Code, remains applicable, an appellant cannot come to this Court without his appeal having been admitted by the High Court.

Under O. 37, r. 1 (which is based on r. 83 of the Judicial Committee Rules) we undoubtedly have [full power to excuse compliance with any of the Rules of the Federal Court, but this power is with reference to the Rules made by the Federal Court itself, as indicated by the expression "these Rules." Such a power cannot extend to excusing compliance with the Rules of the Code of Civil Procedure, in particular O. 45, which have been made applicable to Federal Court appeals, not only by our own O. 9, r. 1, but

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also by the Adaptation of Indian Laws Order. No doubt under O. 37, r. 1, the Federal Court may give such directions in matters of practice and procedure as it shall consider just and expedient : but it is extremely doubtful whether such " directions " can be in supersession of O. 45, Civil Procedure Code, in the absence of any rules amending it, so as to dispense with the necessity of the High Court directing the appeal to be admitted.

In the case before us, the Federal Court excused the appellants from complying with the requirements of O. 10, rr. 1, 2 and 3, F. C. R., which would mean condoning the delay caused by them, exempting them from getting the record printed and removing the time limit for lodging the appeal. But rr. 1, 2 and 3, of O. 10, were intended to apply and do in fact apply to the stage after the appeal has been admitted, as is also apparent from the heading of that Order. The effect of excusing the appellants from complying with these rules would not be to excuse them from complying with the rules of O. 45, Civil Procedure Code, which contemplate the admission of the appeal by the High Court before the record is transmitted to this Court, and the petition of appeal is lodged here.

In my order dated the 5th March, 1940, I had said, " There was no absolute necessity to make the whole of O. 45, Civil Procedure Code, applicable to Federal Court appeals, even where the only ground taken were a constitutional one.[1]" I would now go further and say, with the utmost respect, that it was a mistake to make the whole of O. 45, applicable to a case where a certificate under S. 205 (1) of the Act has been granted. O. 45 has not been made applicable to appeals which lie independently of S. 109, for instance an appeal by special leave to the Privy Council. In the same way it should not have been applied to a case where there is a statutory right of appeal under S. 205 of the Act. Cases where an appeal would lie by virtue of S. 109, Civil Procedure Code, would be different, because that section itself confers such a right of appeal " subject to the provisions hereinafter contained ", including O. 45. In such cases the right of appeal can be exercised only in accordance with the procedure prescribed in that Order. It is most unfortunate that appellants, who have a statutory right to come up to the Federal Court under S. 205 of the Act, and quite independently of S. 109 of the Code, should be hampered by the rules laid down in O. 45, Civil Procedure Code, which had been meant for different classes of appeals altogether.

Applicability of the new Act.—As regards our applying the Bihar Money-Lenders Act (VII of 1939), Sir B. L. Mitter, the Advocate-General of India, objects that we have no power to apply it at all. His contention is that the new Act affected the respondents' vested rights, obtained under the High Court's decree, and they should not be adversely affected. He has further urged that S. 7 applies only when the High Court is hearing an appeal or revision from an inferior court. He sought to distinguish the Privy Council case *K. C.*

1. (1940) 3 F. L. J. 21.

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Mukherjee v. *Mst. Ram Ratan Kuer*[1], relied on in the judgments delivered in *Shyamakant Lal* v. *Rambhajan Singh*[2]. His argument is that in the Privy Council case the new Act was retrospective, because, even as regards past transfers, it had provided that " every person claiming an interest as landlord. . . shall be deemed to have given his consent, etc." No doubt the Act had a retrospective action, but the absolute and irrebuttable presumption of consent would be drawn by courts after the coming into force of the Act. Nevertheless, their Lordships took that Act into account, regarding the suit as still pending. In *Shyamakant Lal's* case, I had pointed out in my judgment that it was a converse case where a new Act, passed during the pendency of the Privy Council appeal, had taken away the appellant's rights, which he was proposing to enforce. It was also pointed out that in England where appeals are by way of " re-hearing ", an appellate court grants relief according to the new law which has come into force in the meantime, even though the judgment of the inferior court had been correct according to the law as it then stood. *Quilter* v. *Mapleson*[3]. See also *The Attorney-General* v. *Birmingham, Tame, and Rea District Drainage Board*[4] where it was reaffirmed that " An appeal to the Court of Appeal is by way of rehearing, and the Court may make such order as the judge of the first instance could have made if the case had been heard by him at the date on which the appeal was heard." It was in that view that I had preferred to base my judgment first on the ground that S. 16 of the old Bihar Money-Lenders Act, which had been impugned, was in fact not void, and that the High Court's view on that point was, in my opinion, not correct. Dr. Asthana the Advocate-General of the United Provinces, on the other hand has urged that we are bound to apply S. 7 of the new Bihar Act which has replaced the old S. 11.

The decree of the High Court is not yet final, as an appeal is pending before us. The adjudication of the rights of the parties as made by the High Court is not yet final. If we allow the appeal on any of the other grounds, we would be bound to remit the case to the High Court, in which event the High Court would be bound to comply with the provisions of S. 7 of the new Bihar Act. When the case goes back, the proceedings before the High Court would still be in appeal from an inferior court, even though the case has been remitted by the Federal Court. Although the provision " No Court shall .... pass a decree, etc.", does affect the powers of a court and so would not be binding on the Federal Court, this Court does not in fact pass any decree. As we would have to declare the judgment which should be substituted for the previous judgment of the High Court, we shall have to take into account the provisions of S. 7 and declare what the new judgment of the High Court should be in accordance with the Bihar Act in force. If, however, we dismiss the appeal such a contingency would not arise.

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1. 63 I.A. 47=I.L.R. (1935) 15 Pat. 268=70 M.L.J. 105.
2. (1939) F.C.R. 193=(1939) 2 F.L.J. 183=(1939) 2 M.L.J. Supp. 45.
3. (1882) 9 Q.B.D. 672.
4. (1912) A.C. 788.

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Appeals to the Federal Court are governed by Ss. 205 and 209 of the Government of India Act. As I said in *Shyamakant Lal's* case on page 204, we are not bound to apply the new Act; at the same time it is equally clear that we are not debarred from applying it. My Lord the Chief Justice and my brother held that the passing of the new Act had made it unnecessary to consider the validity of the old Act. Since then this Court has consistently applied the new Bihar Act without going into the question whether the corresponding provisions of the old Act were void or not. *Ramnandan Prasad* v. *Kulpati Shri Mahant Goshwami Ramji*[1], *Jagdish Jha* v. *Aman Khan*[2], *Surendra Prasad* v. *Gajadhar Prasad*[3], *Jai Gobind Singh* v. *Lachmi Narain Ram*[4], *Birendra Prasad Sukul* v. *Surendra Prasad Sukul*[5], *Subhanand Chowdhury* v. *Apurba Krishna Mitra*[6]. In the last mentioned case the Advocate-General of India had appeared for the respondents. The present case is now the very last case of this kind in which such a question can arise. Unless a manifest error of law was made, it would not now be proper to depart from the practice so far adopted.

Interpretation of Section 7 of the Bihar Act.—It has been urged on behalf of the appellants that under S. 7 of the new Bihar Act, the decree for interest should not exceed the amount of the loan advanced, and that the amount of the loan advanced should be taken to be that amount which has been found to have been for legal necessity. Reliance has been placed by the learned counsel for them on the case of *Birendra Prasad Sukul* v. *Surendra Prasad Sukul*[5]. But in that case the mortgage deed had been executed by two persons, Birendra and Debindra, part of the mortgage money having gone into the pocket of Debindra alone. The plaintiffs released Debindra and his sons from all liability and sued to enforce the mortgage against the half share of Birendra and his sons. They had claimed only one-sixth share of the total amount, because the plaintiffs had inherited only two-sixth share in the mortgage deed, the rest having gone to the defendants. The integrity of the mortgage had been broken and the plaintiffs had discharged one of the mortgagors, and splitting up the liability, were suing the other for his share only. It was not even known how much interest had already been realized from the exempted mortgagor Debindra. It was in these circumstances that the liability of the contesting defendants was considered separately, and it was remarked at page 57, " It could not have been the intention of the legislature that if there are several executants who have borrowed various sums and the creditor sues one of them for his separate share only, having already realized the balance from the others, then the maximum prescribed for the amount of interest to be decreed against him is not to exceed the aggregate of the various sums borrowed by him as well as all the other *pro forma* defendants who are not really being

1. (1940) 3 F.L.J. 1 at p. 6.
2. (1940) 3 F.L.J. 7 at p. 8.
3. (1940) 3 F.L.J. 27—(1940) 1 M.L.J. Supp. 1.
4. (1940) 3 F.L.J. 46—(1940) 1 M.L.J. Supp. 14.
5. (1940) 3 F.L.J. 55—(1940) 1 M.L.J. Supp. 21.
6. (1940) 3 F.L.J. 58—(1940) 1 M.L.J. Supp. 23.

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sued." That ruling cannot apply to the present case, where the defendants, namely, the mortgagor, his sons and grandsons are sued as representing one family, and there is one debt for which the claim is brought. There is no question of distinct and separate interests of the various defendants. The amount had been advanced to the father alone but is effective for creating a charge against the whole family in respect of a part of the amount only. In such a case the words " the amount of the loan advanced " or " the amount of the loan mentioned in such document " must obviously mean the whole amount which passed, as that was the loan. The fact that a part of it is not effective to create a charge on the family property, is a different matter.

Dr. Asthana has abandoned all the other grounds except the last one relating to Rs. 4,805. He has argued that he is entitled to urge this ground under S. 205 (2) of the Act, and in the alternative has asked for leave to urge it. But again as I pointed out to him there is a difficulty in his way.

Necessity of a further certificate.—S. 205 (1) of the Government of India Act gives jurisdiction to this Court to hear appeals, if the High Court certifies that the case involves a constitutional question. No appeal lies at all, if no such certificate is given. Under sub-section (2) where such certificate is given, any party may appeal to the Federal Court,

(i) on the ground that any such question has been wrongly decided, and

(ii) on any ground on which that party could have appealed without special leave to His Majesty in Council, if no such certificate had been given, and

(iii) with the leave of the Federal Court on any other ground.

In such an event no direct appeal lies to His Majesty in Council either with or without special leave.

The word " ground " has been used at three places in sub-S. (2). According to the ordinary rule of interpretation each ought to have, as far as possible, the same meaning at all the three places in the same sub-section. Now the word " ground " in the first category obviously means ground of objection or point in the appeal. The word " ground " in the third category also obviously has the same meaning, that is to say, ground of objection or point. It follows that ordinarily the interpretation of the word " ground " in the second category should be the same so as to mean a ground of objection. This would make the second category read as ' on any ground of objection on which that party could have appealed to His Majesty in Council.'

In the Code of Civil Procedure, there is a clear distinction between a case in which there is a right of appeal and the grounds which can be taken when an appeal lies. Ss. 109 to 111, Civil Procedure Code, deal with the cases in which appeals " lie " to His Majesty in Council, and not with the grounds which can be taken when an appeal has lain. On the other hand, O. 45, r. 3, Civil Procedure Code, refers to the " grounds " of appeal which must be stated in the petition for leave to appeal to His Majesty in Council. If the word " ground " in the second category were to mean ground

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of objection, then that would entitle an appellant, once an appeal has come to the Federal Court on account of the certificate on a constitutional question, to raise all grounds of objection which he could have raised in an ordinary appeal to His Majesty in Council. He would be entitled to urge these as of right without being hampered by the provisions of O. 45, Civil Procedure Code.

On the other hand, it is probable that the intention of Parliament was to allow an appeal on a certificate as to the constitutional question, and then to allow an appeal on other points, only in those " cases " in which an appeal would lie to His Majesty in Council. If this was the intention of Parliament, then the word " ground " has been somewhat unhappily used and the words " on any ground on which " should be treated as being equivalent to " in any case in which." There is no doubt, however, that the Adaptation of Indian Laws Order (1937) has accepted this second interpretation of the word " ground " in the second category. Ss. 109, 110 and 111, Civil Procedure Code (with S. 111-A added) have been adapted and made expressly applicable to Federal Court appeals. Even O. 45, Civil Procedure Code with a few modifications, has been made applicable to them. Rule 17, which has been added to O. 45, makes the provisions of the Order, which are ordinarily applicable to the case of a certificate under S. 110, Civil Procedure Code, apply even to the case where the only ground taken is a constitutional one.

Now, an examination of rules 1 to 14 of O. 45 of the Code shows that if an appellant also wishes to take some grounds other than the constitutional one, he must " state the grounds of appeal and pray for the certificate either that as regards the amount or value and nature, the case fulfils the requirements of S. 110, or that it is otherwise a fit one for appeal to His Majesty in Council " (O. 45, r. 3). The necessary result is that in such a case the certificate granted by the High Court under S. 205 (1) of the Act will not be sufficient, but the appellant must in addition obtain the further certificate required by r. 3. It follows that if an appellant wishes to take such other grounds in the appeal, he can raise them under the second category only if the value is Rs. 10,000 and upwards and, where there is an affirmance of the first court's decision, the appeal involves some substantial question of law, or the High Court certifies that the case is otherwise a fit one for appeal to the Federal Court. The whole of the procedure prescribed in O. 45, Civil Procedure Code, including that for furnishing security for costs, would apply to the application praying for such a certificate, even though a certificate under S. 205 (1) of the Act has already been granted. In this view it would not be proper to allow an appellant to evade these provisions by simply obtaining a certificate under S. 205 (1) of the Act, and then asking for leave to raise all the other grounds by bringing them within the third category. This last category refers to "other" grounds, which must mean other than those mentioned in the first and second categories. In view of the cumulative sense of the conjunction ' and ' which has been used instead of ' or ' in the

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alternative sense, the position of the respondent who files a cross-appeal direct, in the Federal Court is still more difficult. It is however not absolutely necessary to settle the interpretation of the word "ground" finally, because I agree with my brother that on the merits the defendants' plea must fail even if we hear it.

I concur in the order proposed.

Varadachariar, J. :—The present case is one of a number which have lately come before this Court from Patna and in which questions have been raised under the Money-Lenders Acts passed in Bihar in 1938 and 1939. In a mortgagee's suit for recovery of money by sale of the mortgaged property, the principal defendants (defendants nos. 1 to 6) raised contentions questioning the validity and binding character of the mortgages sued on and also sought to have the rate of interest reduced. The suit comprised claims on two mortgage-bonds, one dated December 12, 1918, for Rs. 45,000 and the other dated October, 17, 1919, for Rs. 15,000, which had been executed by the first defendant for himself and as guardian of his sons, defendants nos. 2 and 3, who were then minors. The amounts had been borrowed partly to discharge antecedent debts and partly to meet future expenses ; and the bonds whereby the joint family property was given as security provided for payment of compound interest at 12 per cent. per annum with annual rests. Defendants nos. 4 to 6 are the minor sons of the second defendant.

The trial court found that the bonds were supported by consideration to the full extent stated ; but as it held that portions of the debts had not been borrowed or used for purposes binding on the joint family, it passed a mortgage decree for Rs. 27,287-4-0 only on the first bond and Rs. 5,000 on the second. The court held that the stipulated interest was not "hard, unconscionable or penal", and accordingly awarded to the plaintiffs compound interest at 12 per cent. per annum with annual rests. There was an appeal and cross-appeal to the High Court, which increased the principal amount recoverable under the first bond by Rs. 7,305-11-6 and made a slight reduction in the sum due under the second bond. The claim for compound interest was disallowed, and simple interest only awarded at 12 per cent. per annum up to the date fixed for payment in the decree of the trial court. The court declined to award interest on a sum of Rs. 2,000 out of the sum due under the first bond.

Among the contentions raised on behalf of the defendants before the High Court, there was one based on S. 11 of the Bihar Money-Lenders Act (No. III of 1938) which had been enacted during the pendency of the appeal. The High Court held that section to be void under S. 107 of the Constitution Act, and granted a certificate under S. 205 (1) of the Act. The first defendant died during the pendency of the suit and the present appeal has been preferred by defendants 2 to 6. The plaintiffs filed some cross objections, but withdrew them before the appeal came on for hearing. It only remains to add that soon after the decision of the High Court in the present case, the Bihar Legis-

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lature repealed the Money-Lenders Act of 1938 and substantially re-enacted it as Act No. VII of 1939, taking certain precautions which were required to obviate the objections to the validity of the earlier Act.

In view of the earlier decisions of this Court in similar cases, counsel for the appellants rightly assumed that his clients would be held entitled to the benefit of S. 7 of the new Act of 1939, though it had been enacted only after the date of the decision of the High Court in this case; and, on that assumption, he raised a contention as to the manner in which the maximum amount of interest for which his clients could be held liable should be fixed in the particular circumstances of the case. Counsel for the respondents recognised that the decisions of this Court entitled the appellants to claim the benefit of the Act of 1939, but he was permitted to re-argue the question as he suggested that certain relevant considerations had not been urged or dealt with on previous occasions. It, however, seems to me that the considerations now urged by him have in substance been taken into account in the earlier cases, though the language employed might not have stated them in the particular form in which he now puts them.

The respondents' argument was founded on the theory that when hearing an appeal this Court was only concerned to see whether or not the judgment of the High Court was in conformity with the law as it stood at the time that that judgment was given; and it was contended that as the Act of 1939 had not been enacted at the time when the High Court decided the present case, this Court was not competent to give relief to the appellants in terms of S. 7 of the new Act. Counsel for the respondents laid stress upon the language of S. 7 of the Act of 1939, the words being " no court *shall* .... pass a decree, etc.", though he recognized that the section has in terms been made applicable to appeals in suits brought before the commencement of the Act and that the decree in appeal yet remained to be passed in this Court; but he insisted that the pendency of the appeal in this Court was of no consequence and that the material date was the date of the High Court's decree, because an Act passed by the Bihar Legislature could not directly operate to take away the powers of this Court. This line of argument seems to rest on more than one erroneous assumption.

The question whether S. 7 of the Act of 1939 is or is not one of which even this Court is bound to take notice is not free from difficulty. Under the Constitution Act, a Provincial Legislature is precluded from dealing with the jurisdiction and powers of the Federal Court, but in deciding a question of this kind, one must look at the substance of the impugned provision and not merely at its form. If S. 7 of the Act of 1939 is to be regarded as a provision regulating the substantive rights of parties, by fixing the maximum amount of interest which a creditor is entitled to claim from his debtor up to the date of the institution of the suit, can it be described as one dealing with " the jurisdiction or powers " of the Court merely because it takes the form of a direction to the Court? The section might equally well have enacted that no money-lender shall be entitled to recover more than a certain sum

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by way of interest; and it would then be difficult to say that it was legislation which interfered with the jurisdiction or powers of this Court. Is the provision to be held to be valid or invalid according as it is couched in one form or in the other when the substantial effect of both forms is the same?

It does not however seem to be necessary for the purpose of this case to express a final opinion on the question just discussed, because even assuming that this Court is not directly bound by the provisions of the Bihar Act, the appellants will still be entitled to claim that this Court is bound to pronounce the judgment which the High Court would have pronounced, if it were hearing the appeal at this moment. There can be no doubt that if the High Court at Patna had now to deal with this case, it would have to govern itself by the provisions of S. 7 of the Act of 1939. Sir Brojendra Mitter argued that before the passing of the Act of 1939 the decree of the High Court in the present case had become final, and that the High Court would under s. 209 of the Constitution Act have to deal with the present case again only if this Court allowed the appeal, but that there was no justification for this Court allowing the appeal, unless it could say that the decision of the High Court was incorrect even according to the law as it stood at the time when the decision was given. I am unable to agree that that is the correct position.

Once the decree of the High Court had been appealed against, the matter became *sub judice* again and thereafter this Court had seisin of the whole case, though for certain purposes, *e.g.*, execution, the decree was regarded as final and the courts below retained jurisdiction. In *Subhanand Chowdhary* v. *Apurba Krishna Mitra*, (Case No. 13 of 1939) this Court has held that the mere fact that the particular statute in respect of which the constitutional question was originally raised had been since repealed will not put an end to the appeal; and, except on the hypothesis that this Court is only a court of error, its power to do justice between the parties cannot be restricted to cases in which it is able to hold that the lower court has gone wrong in its law. The contention that the power of a court of appeal is so limited was distinctly negatived in *Attorney-General* v. *Birmingham etc., Drainage Board*[1] and *Quilter* v. *Mapleson*[2], which are referred to in the judgment in *Shyamakant Lal* v. *Rambhajan Singh*[3]. As stated in *Shyamakant's* case, there is no reason to suppose that the powers of this Court when acting as a court of appeal are less extensive than those of the High Courts when hearing an appeal; and it has been a principle of legislation in British India at least from 1861 that a court of appeal shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by the Civil Procedure Code on courts of original jurisdiction. [See Act No. XXIII of 1861, S. 37; Act No. X of 1877, S. 582; Act No. XIV of 1882, S. 582; and Act No. V of 1908, S. 107 (2).] The very words

1. (1912) A.C. 788.
2. (1882) 9 Q.B.D. 672.
3. (1939) F.C.R. 193=(1939) 2 M.L.J. Supp. 45.

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of O. 58, r. 5 of the Rules of the Supreme Court, on which Bowen, L.J., laid stress in *Quilter* v. *Mapleson* at p. 678 and Lord Gorell in *Attorney-General* v. *Birmingham etc. Drainage Board*, at p. 801, namely that the court of appeal has power to make such further or other order as the case may require, have been reproduced in O. 41, r. 33, of the Civil Procedure Code of 1908; and even before the enactment of that Code, the position was explained by Bhashyam Iyengar, J., in *Kristnama Chariar* v. *Mangammal*[1] in language which makes it clear that the hearing of an appeal is under the processual law of this country in the nature of a re-hearing. The Indian Codes have from 1859 conferred upon a court of appeal the power given by O. 58, r. 4, R. S. C. to allow further evidence to be adduced; and though the English rule does not in terms impose the same limitations on this power as the Indian Codes do, these limitations are implied in the reference to "special grounds" in the English rule and have in effect been insisted on even in England as a matter of practice: see *Nash* v. *Rochford R. D. C.*[2] In view of these provisions, it seems to me to make no difference that it is not explicitly stated in the Indian statutes (as in Order 58, R. S. C.) that an appeal is by way of rehearing. It is also on the theory of an appeal being in the nature of a re-hearing that the courts in this country have in numerous cases recognised that in moulding the relief to be granted in a case on appeal, the court of appeal is entitled to take into account even facts and events which have come into existence, after the decree appealed against. I may also refer to *Kanakayya* v. *Janardhana Padhi*[3], where the law on the point is fully discussed.

The practice of the Judicial Committee in this respect does not appear to have been uniform. In *Ponnamma* v. *Arumogham*[4] Lord Davey, delivering the judgment of the Board observed that "Their Lordships have only to say whether that judgment (the judgment of the Supreme Court of Ceylon) was right when it was given." After referring to *Quilter* v. *Mapleson*, His Lordship added at p. 390: "Without limiting the extent of His Majesty's prerogative Their Lordships can safely say that it is not the practice of this Board to entertain any other appeal than one strictly so called, in which the question is whether the order of the court from which the appeal is brought was right on the materials which that court had before it." In the recent case of *Mukherjee* v. *Ram Ratan Kuer*[5], it would appear from the report of the arguments in 63 Indian Appeals that *Quilter* v. *Mapleson* was referred to, and it was observed by Lord Thankerton in the course of the argument that the duty of a court is to administer the law of the land at the date when the court is administering it. This adds significance to the fact that Their Lordships in that case did not deal with the judgment of the Patna High Court on its merits, but dismissed the appeal on the strength of a provision contained in

1. (1902) I.L.R. 26 M. 91 at pp. 95, 96. 2. (1917) 1 K.B. 384.
3. (1910) I.L.R. 36 Mad. 439 at pp. 441-444=21 M.L.J. 31.
4. (1905) A.C. 383.
5. I.L.R. (1935) 15 Pat. 268=63 I.A. 47=70 M.L.J. 105.

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an enactment which was passed only during the pendency of the appeal before His Majesty in Council. In these circumstances I am of opinion that we should follow the law as laid down in the latter case.

If this Court is entitled to act as a court of appeal in the sense above explained, Sir Brojendra Mitter did not, in view of the decisions in *Quilter* v. *Mapleson* and *Attorney-General* v. *Birmingham etc. Drainage Board* contend that the appellants were not entitled to claim the benefit of S. 7 of the Act of 1939. It is therefore unnecessary to consider the contention which he raised as to the precise character in which the High Court acts when it passes a decree in terms of a declaration made by this Court under S. 209 of the Constitution Act.

Counsel for the appellants argued that in determining the extent of their liability for interest under S. 7 of the Act, the maximum payable up to the date of the institution of the suit must be held to be only the sums of Rs. 34,492-11-6 and Rs. 4,949-8-0, that is, the sums which have been held to be the debts binding on the joint family out of the sums borrowed under the mortgage bonds. This contention is in my opinion untenable. S. 7 of the Act mentions three limits, (1) the amount of loan advanced ; (2) the amount of loan mentioned in the document, and (3) the amount of loan evidenced by such document. It is not necessary for the purpose of this case to consider what is to happen when the amounts calculated on these several bases differ; for it has been found in this case that in respect of both the bonds , the full amounts specified therein, *viz.*, Rs. 45,000 and Rs. 15,000, had in fact been advanced or were otherwise due. It is again unnecessary to consider the situation which might arise if it should be found that part of a loan had been advanced for " illegal " or " immoral " purposes in the sense in which those expressions are used in the general law of contracts. The finding in the present case that out of the sums due under the bonds only Rs. 34,492-11-6 and Rs. 4,949-8-0 respectively were binding on the joint family does not imply that as between the lender and the borrower there was not a valid contract of loan under which the whole amount could have been recovered from the borrower by having recourse to his separate properties, and, if only effective steps had been taken during his lifetime, even from his share in the joint family property. The appellants are no doubt entitled to rely on the rules of the Hindu law and to limit their liability to the binding portion of the debt ; but on that portion interest will be calculated in accordance with the terms of the contract, except where the court finds reason to reduce the contract rate. If and so far as the appellants claim the benefit of S. 7 of the Act of 1939, the limitation on the amount of interest can only be imposed in terms of the section and not by reading into it any rule derived from the personal law of the parties.

Dr. Asthana suggested that his contention received some support from the decision of this Court in *Birendra Prasad Sukul* v. *Surendra Prasad Sukul*, case No. 12 of 1939 ; but the facts of that case were quite different. Though

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the mortgage-bond executed by defendants 1 and 4 in that case purported to be for a sum of Rs. 1,00,000, it was found that consideration must have passed to the two brothers jointly only to the extent of Rs. 75,000, the balance of Rs. 25,000 having gone, if at all, to the exclusive benefit of the fourth defendant. The plaintiffs settled their claim against the fourth defendant and sued the first defendant and his sons for recovery of a sixth share of the debt which they alleged was due from them. There was in the judgments of the courts below some reference to family benefit, but that was apparently in connection with a plea of the first defendant that he had been duped into joining in the execution of the mortgage-bond without receiving any benefit thereunder. The question of "family benefit" under the Hindu law rules relating to joint family transactions did not arise in the case, since the first defendant was a party to the document, and it was found that his sons had not been born at the date of the suit transaction. On these findings, this Court held that as the plaintiffs had themselves split up the liability of the parties, the case must be dealt with as one in which the loan due to the plaintiffs from the first defendant and his sons was only Rs. 12,500, *i.e.*, one-sixth of Rs. 75,000. The decision did not purport to deal with a case where out of the amount found to have been advanced to the particular debtor only a smaller sum was held to have been required for family necessity, so as to make that sum alone recoverable from out of the joint family property of the borrower and his sons.

Out of the items of principal allowed by the High Court in plaintiffs' favour, on their memorandum of objections, exception was taken by the appellants here to the allowance of the sum of Rs. 4,805-11-6, a portion of the consideration of the first mortgage-bond. They alleged that that sum was utilized for the satisfaction of an earlier mortgage for Rs. 6,000, and that a portion of the consideration of this earlier bond was in its turn utilized for the satisfaction of a debt due to the plaintiffs under three hand-notes executed by the first defendant. The trial court had disallowed this item on the ground that the moneys borrowed had been taken by the first defendant for the purposes of an unnecessary and improper litigation, and that the debt was to that extent an "Avyavaharika" debt for which the family property could not be held liable. The High Court reversed this finding, on the ground, that the onus was on the defendants to prove how much of the moneys borrowed under these documents had been used for that litigation and that they had adduced no satisfactory reasons. Dr. Asthana contended that in coming to this conclusion the High Court had overlooked an admission made by the third plaintiff in the witness box to the following effect: "It has been correctly put down in the bond for Rs. 6,000 that the three hand-notes mentioned in it were for the expenses of the case." This general statement carries the case no further than the recitals in the bond for Rs. 6,000, because the witness only affirmed the correctness of those recitals, and as pointed out in the judgment of the High Court, the bond recites not only the expenses of the litigation, but also payment of Government revenue and other family expenses

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as purposes for which moneys were borrowed under the three hand-notes. These debts must be treated as " antecedent debts " at the date of the mortgage for Rs. 6,000, and *a fortiori* so on the date of the mortgage for Rs. 45,000, and a mortgage of the family property to secure their repayment was *prima facie* valid. If the sons and grandsons desired to escape liability for these debts, the onus lay upon them to prove that they were " Avyavaharika " debts.

On the conclusions above stated, no interference with the decree of the High Court will be necessary so far as the claim under the second mortgage-bond is concerned, because the interest calculated in accordance with the decree of the High Court on the sum of Rs. 4,949-8-0 for which alone the appellants have been held liable under this bond will not at the date of the institution of the suit exceed Rs. 15,000, the amount mentioned in the bond. As regards the first mortgage-bond, the amount recoverable by the plaintiffs must be calculated on the footing that only a sum of Rs. 45,000 was due for interest on April, 16, 1932, the date of the plaint. The appeal is to this extent allowed and the case will be remitted to the High Court with a direction to pass a revised decree on the above basis.

It remains to advert to two points of processual law arising out of certain defects in the steps taken by the appellants to bring the appeal before this Court. The first relates to the need for a separate certificate under O. 45, r. 3, C. P. Code, before a party can raise before this Court any question besides the one covered by the certificate under S. 205 (1) of the Constitution Act. As the appellants have failed on the merits in respect of the question of fact sought to be raised by them, it is unnecessary to express any opinion in this case on this point of processual law. The other question relates to the effect of the absence of an order by the High Court (under O. 45, r. 8, Civil Procedure Code) declaring the appeal admitted. My learned brother has discussed this point at some length ; but as no arguments bearing on this question were advanced at the Bar, I shall content myself with a few observations.

Though the scheme of O. 45, implies that, till the High Court makes the order under r. 8, it still retains a measure of control over the proceedings, it does not appear to me that such an order is a condition precedent to the exercise of jurisdiction by this Court. The collocation of paragraph (a) of r. 8 of O. 45 with paragraphs (b), (c) and (d), which relate to notice to the respondents, transmission of the records and the delivery of a copy of the records to the respondents, is not without significance ; and it certainly cannot be said that the steps contemplated by paragraphs (b), (c) and (d) of the rule are so vital as to affect the jurisdiction of this Court. In the present case, the High Court has, since the order of this Court on the 5th of March, 1939, enabled the appellants to have the records printed at Patna and have transmitted them to this Court ; and presumably copies have been given to the other side in due course. The requirements of paragraphs (c) and (d) of r. 8 have thus been complied with, and there seems to be no obstacle in the way of this Court in disposing of the appeal in due course.

Varadachariar, J.

It may be a difficult question on the rules as they stand what the position would be if security for costs was not given by the appellants in a case where such security is necessary under the rules. It is certainly doubtful if this Court has power to dispense with the giving of security in such a case. But the rules as to payment of printing deposit, transmission charges, etc., stand on a different footing, and if this Court has, as it has already held, power to dispense with or give special directions as to printing and production of the records before this Court, it would be illogical to insist that the High Court must pass an order under paragraph (a) of r. 8 of O. 45 which can be passed only on compliance with the directions originally given by the High Court, which *ex hypothesi* have become inoperative because of this Court's directions in the matter. This Court was careful only to excuse the appellants from the operation of the rule of this Court which fixes sixty days from the date of the admission of the appeal by the High Court as the period during which the appellants should lodge their petition of appeal in this Court and gave them liberty to furnish copies of the record to this Court on their own responsibility. The Court then observed that these particular provisions in O. 45 were only procedural provisions and that it was not necessary to hold that non-compliance with them in the High Court ousted the jurisdiction of this Court when a certificate under S. 205 (1) of the Constitution Act had once been given. I see no reason now to think otherwise and I am of opinion that, as between the parties to these proceedings the view already expressed by the Court is binding.

As the appellants have only partly succeeded in their appeal with regard to the interest and have failed in their appeal with regard to the principal, there need be no order as to costs in this Court.

K. S.

Appeal allowed in part.

THE FEDERAL COURT OF INDIA.

[Appellate Jurisdiction.]

The United Provinces .. **Appellant.*

v.

Mst. Atiqa Begum and others .. *Respondents.*

Practice—Suit or proceeding between private parties involving constitutional validity of Act—Government impleaded as party—Government of India Act, 1935, *S.* 205 (2)—*Appeal by Government to Federal Court—Competence—U. P. Regularization of Remissions Act*, (*XIV of* 1938)—*Constitutional validity.*

Gwyer, C.J., and *Varadachariar, J.*—(*Sulaiman, J.* dissenting).—The U. P. Regularization of Remissions Act is an Act with respect to matters covered by No. 21 of List II. Power to legislate in respect of collection of rents includes power to legislate with respect to remission of rents and legislation to validate doubtful executive orders must necessarily be regarded as subsidiary or ancillary to the power of legislating on the particular subjects in respect of which the executive orders may have been issued.

Sulaiman and *Varadachariar, JJ.* (*Gwyer, C.J.*, doubting).—S. 205 of the Government of India Act is principally concerned with the determination of constitutional questions though arising in a litigation between private parties. The Government stands in a peculiar situation: it has no doubt pecuniary or proprietary interests in one sense, but in another aspect

*Case No. 5 of 1940.   6th December, 1940.

it is also the custodian and the protector of the interests of the public and the question of the legality of a statute is one in which it has a special interest. It is undesirable to place the Government in the embarrassing position, that while it must deem itself bound by an opinion expressed by the High Court as to the invalidity of a statute, it must find ways of persuading private parties formally to file an appeal, if it desires to have the constitutional question brought up before the Federal Court. The procedure under S. 213 of the Constitution Act may not be found appropriate when the question of the legality of a statute has actually been put in issue before a Court of law in a litigation between private parties. Accordingly where either the Advocate-General or the Government has been added as a party to the proceedings in the High Court, though the private parties do not appeal, the Advocate-General or the Government has a right to prefer an appeal to the Federal Court as "any party" under S. 205 (2) of the Constitution Act the language of which is different from that of S. 96 of the Civil Procedure Code.

Appeal from a Full Bench judgment* dated 11th March, 1940, of the Allahabad High Court (Iqbal Ahmad, Bajpai and Ismail, JJ.)

Dr. Narain Prasad Asthana, Advocate-General of the U. P. and *Sri Narain Sahai* instructed by *G. Sahay*, *Agent*, for Appellant.

P. L. Banerji and *Prem Mohanlal Verma* instructed by *T. K. Prasad*, Agent, for Respondents,

The Court delivered the following judgments:—

Gwyer, *C.J.*:—In this case the principal question to be decided is whether the Regularization of Remissions Act, 1938 (XIV of 1938), an Act of the Legislature of the United Provinces, was within the competence of the Legislature which enacted it.

The litigation in which the question has arisen can be briefly described. The defendants to the original suit were *thekadars*, a *thekadar* being, by statutory definition, "a farmer or other lessee of proprietary rights in land, and in particular of the right to receive rents or profits", with the terms of his lease or *theka* embodied in a written instrument executed by the landlord. They were sued by their lessors for arrears of rent for the year ending June, 1931, and the two following years at the rate reserved by the lease, and among other defences pleaded that remissions of rent had been ordered by the Local Government which ought to be taken into account in calculating the amount due. The plaintiffs contended that these remissions were beyond the power of the Government to order and that the defendants were not therefore entitled to rely upon them. On this issue both the trial judge and the District Judge on appeal decided in the defendants' favour. The plaintiffs then appealed to the High Court and during the pendency of the appeal a Division Bench of the High Court held in another case, *Muhammad Abdul Quaiyum* v. *Secretary of State for India*[1], that remissions made in pursuance of the Government order above referred to had no legal effect. In order to appreciate the legal questions involved, it is necessary to refer to certain statutory provisions contained in the Agra Tenancy Act, 1926, which at all material times regulated the relations between the parties, though it has since been repealed and only re-enacted with substantial alterations.

* I.L.R. (1940) All. 455 (F.B.).

1. I.L.R. (1938) All. 114.

Gwyer, C.J.

The purpose of the Act is indicated by its title, "An act to consolidate and amend the law relating to agricultural tenancies and certain other matters in Agra," and it may be described as a code of landlord and tenant law for the province of Agra. At the end of that Part of the Act which dealt with the subject of rent and of the machinery whereby in certain circumstances rent might be enhanced or abated, there was a fasciculus of sections entitled "Exceptional Provisions", including three sections which require to be noticed. S. 72 empowered a Court making a decree in a suit for arrears of rent to allow, with the sanction of the Collector, such remissions from the rent payable as might appear to the Court to be just, if the produce of the land had been so diminished by drought, hail, deposit of sand or other like calamity during the period for which the arrears were claimed that the full amount of rent payable by the tenant for that period could not be equitably decreed. The section then provided that where rent was thus remitted, the revenue authorities should on the report of the Court grant a remission of land revenue in proportion to the rent remitted for the corresponding area belonging to the same landlord. S. 73 dealt with the converse case, and provided that when for any cause the Local Government, or any authority empowered by it, remitted or suspended for any period the whole or any part of the revenue payable in respect of any land, a Collector might order that the rents of the tenants should be remitted or suspended "to an amount which shall bear the same proportion to the whole of the amount payable in respect of the land as the revenue of which the payment has been so remitted or suspended bears to the whole of the revenue payable in respect of such land." By S. 74, an order passed under S. 73, was not to be questioned in any civil or revenue court, and no suit was to lie for the recovery of any rent of which the payment had been thus remitted or suspended. It will be seen therefore that, in the first case, the remission or suspension of land revenue followed the remission or suspension of rent allowed by the Court and sanctioned by the Collector; and that, in the second, remission of rent might be ordered by the Collector only after the Local Government had remitted or suspended the land revenue. S. 73 was expressly extended to *thekadars* by S. 219 of the Act, but not S. 72. The reason no doubt was that where the parties had embodied their contract in a formal written instrument, they must in agreeing upon the amount of rent be assumed to have had in mind the possibility of such occurrences as were dealt with in S. 72; but a remission or suspension of land revenue under S. 73 would destroy the basis upon which they must necessarily have contracted and it would be inequitable if a consequential adjustment were not permitted.

In 1931, the United Provinces were faced with a catastrophic fall in agricultural prices, followed by threats to withhold rent on a large scale. Faced with what was clearly a most difficult situation, the Government appears to have acted with courage and promptitude. It took the view that the most urgent problem was that of rent, and devised a scheme for the systematic reduction of rents, varying with the circumstances of the different districts,

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followed later by consequential adjustments in land revenue. The plans adopted were described in a series of communiques issued from time to time, the first being dated April 29, 1931, and the last October, 28, 1932. The Government appears to have been well aware of the legal position, for in its last communique, a statement on the Report of the Rent and Revenue Committee of the Legislative Council, it observed that " the Governor in Council .. . . recognizes that the action which Government were compelled to take last year was not covered by any provision in the existing law, and he is as anxious as any party that the position should be regularized as soon as possible. But owing to the magnitude of the problem the process will inevitably take time. The law was not framed to meet such a position as has arisen from the recent severe fall in prices." The Government, in other words, were faced with a problem with which executive governments have often to deal; a grave emergency, threatening public order, and inadequate powers for meeting it. In circumstances such as these a government has to do the best it can, relying if it exceeds the limit of its powers, upon the willingness of the Legislature to indemnify it subsequently; and Legislatures are usually prepared to grant a government absolution, if they are satisfied of the gravity of the emergency, of the *bona fides* of the action taken, and of the reasonableness of the measures adopted. A government however always runs the risk of the measures which it has taken becoming the subject of legal proceedings before it has obtained its indemnity, and this is what happened in the present case. It is clear that S. 73 of the Act only enabled remissions of rent to be ordered, if there had been a prior remission of land revenue; and therefore the orders of the Government on this occasion had no legal force or effect and could not be relied upon by any tenant in a suit by his landlord for the recovery of arrears of rent. The Allahabad High Court so decided, as I have already stated; and it was because of this decision that the Government found themselves compelled to invite the Legislature to pass the Act which is the subject of the present appeal; the question is whether that Act is effective for the purpose for which it was designed. I think it right to observe, in justice to the Government, though the matter does not of course affect the legal position, that while no doubt its action exposed it to much criticism, a substantial number of landlords were willing to co-operate with it in meeting the emergency. This appears from the communique of May 11th, 1931, in which the Government recorded its appreciation of the spirit shown by a deputation of the Taluqdars of Oudh who had waived their legal claims and agreed without condition to remit whatever Government considered fair to their tenants; and also of the generosity with which the Agra landlords had shown their willingness to grant remission to a large number of cultivators. It is desirable that this should be said, for courts of justice, while giving no countenance to the theory that governments are at liberty to break the law whenever they find it convenient to do so, ought to abstain from harsh or ungenerous criticism of measures taken in good faith by those who

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bear the responsibility of government, when suddenly faced with a serious and perhaps dangerous situation.

The Regularization of Remissions Act, 1938, had been passed before the present appeal came before the High Court, and when the appellants sought to take advantage of it, on the ground that the respondents could no longer challenge the validity of the remission orders, the latter replied by challenging the new Act itself. This point was referred to a Full Bench, which held the Act to be beyond the competency of the Legislature to enact. The three learned Judges who composed the Bench (Iqbal Ahmed, Bajpai and Mohammad Ismail, JJ.) all took the view that the Act was contrary to the provisions of S. 292 of the Constitution Act, because it attempted to legislate retrospectively ; but Iqbal Ahmad, J., was also of opinion that none of its provisions were with respect to any of the matters set out in List II of the Seventh Schedule to the Constitution Act, nor indeed with respect to any of the matters in List III, the Concurrent List.

Before the case was heard by the Full Bench, the High Court had caused notice to be given to the Advocate-General of the Province, in order that, if the United Provinces Government so directed, he might appear and support the validity of the Act. The Advocate-General was accordingly heard ; and when, after the Full Bench had given judgment, the case came again before the High Court to be finally dealt with, the Government applied to be made a party to the appeal, in order that (as the application stated) it might have a right of appeal to the Federal Court . The application not being opposed, the Government was duly made a party ; and its name appeared thereafter as respondents on the record, under the style of the United Provinces Government, in addition to those of the plaintiffs-appellants and the defendants. In the final order of the High Court however, admitting the appeal to this Court, the parties on the record are described as "The United Provinces, Applicant (*sic*) to the Federal Court", with all the original plaintiffs and defendants as respondents. It is in that form that the appeal has now come before us. It should be added that the defendants did not enter an appearance in this Court and only the United Provinces and the plaintiffs were represented at the hearing.

In these circumstances counsel for the lessors took a preliminary objection and contended in a very able argument that the Advocate-General ought not to be heard, because the High Court had no power to make the Province a party to the suit and the Province had therefore no right to appeal. He put it as a matter of jurisdiction and not merely as a wrongful exercise of discretion by the High Court.

The application of the United Provinces was made under O. 1, r. 10 (2) of the Civil Procedure Code, the material words of which are as follows :— "The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court to be just, order . . . . . . that the name of any person who

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ought to have been joined, whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, to be added." Counsel for the lessors argued that the desire of the Province to secure the right of appeal did not make O. 1, r. 10, (2) applicable to the case; but he also based his argument on broader grounds and contended that the mere fact that the validity of provincial legislation was being challenged was no sufficient reason for making the Province a party to a suit between private persons.

I desire to say at the outset that, assuming for the moment that there was jurisdiction to add a party to represent the executive Government of the Province that party ought not in my opinion to have been the Province itself. It is true that by s. 176 (1) of the Constitution Act a Provincial Government may sue or be sued by the name of the Province, and may, subject to any provisions which may be made by Act of the Federal or the Provincial Legislature, sue or be sued in relation to its affairs in the like cases as the Secretary of State in Council might have sued or been sued if the Act had not been passed. But it seems to me that where the validity or constitutionality of provincial legislation is in issue, and not any matter relating to the proprietary rights or interests of the Province, it is more convenient and more correct that the Advocate-General should represent the executive Government for the time being of the Province. This is the Dominion practice, and in my opinion it ought to be followed in India. The Secretary of State was first made liable to be sued by S. 65 of the Government of India Act, 1858, and the same suits and remedies were made available against him as had been available against the East India Company. He was no doubt substituted for the East India Company after the transfer of all the rights of the Company to the Crown, because under the constitutional arrangements made by the Act of 1858 he had complete control of all the revenues of India. But the question of the constitutionality of an Indian statute could rarely have arisen before the present Constitution Act, and even more rarely still in the case of a provincial statute; and it seems to me, as I have said, that the more convenient course is to confine the operation of S. 176 (1) to cases in which the proprietary rights or interests of the Provinces are affected, and, if the Government of a Province desires to uphold the validity of a provincial Act or to challenge that of a Federal Act, it should direct the Advocate-General of the Province to intervene on its behalf.

A number of cases were cited on the true construction of O. 1, r. 10. Counsel for the lessors relied principally upon *Sri Mahant Prayaga Doss Jee Varu* v. *Board of Commissioners for Hindu Religious Endowments, Madras*[1], in which Srinivasa Ayyangar, J. refused an application by the Secretary of State to be added as a party in a case said to involve the question whether an Act of the Provincial Legislature was *ultra vires*. The learned Judge

1. (1927) I.L.R. 50 Mad. 34=51 M.L.J. 148.

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treating the case as one of first impression, held that the words "all the questions involved in the suit" must refer to questions as between the parties to the litigation, that neither on principle or authority could the Secretary of State be regarded as a necessary or a proper party, and that he ought not to be joined as an additional defendant. He concluded his judgment with these words :—"Having regard to the number and variety of legislative bodies and authorities in the country at the present day, paramount, imperial, local, delegated subordinate, etc., I feel that questions of *ultra vires* are certain to be raised in the Courts in increasingly large numbers of cases and I refuse to contemplate with equanimity the prospect of the Secretary of State for India being required by every defendant to be made a party in every one of them." This judgment was criticised and dissented from in *Secretary of State and Others* v. *Murugesa Mudaliar*[1] by Venkatasubbarao, J., a case in which the plaintiff had brought a suit against a District Board for a declaration that he had been duly elected a member of the Board by a resolution passed at the meeting of a certain Taluq Board. The Government applied to be joined as a defendant, but both plaintiff and defendant opposed the application. It was held that since by a local Act Government had the power of control over all local boards in the Province and could suspend the execution of any resolution (as they had apparently done in the case of the Taluq Board), it was a proper party to the suit and ought to be added. The learned Judge was of the opinion (which I cannot myself share) that Srinivasa Ayyangar, J., had in the earlier judgment ignored the distinction made in O. 1, r. 10, between (1) persons who ought to have been joined, and (2) persons whose presence is necessary to enable the Court completely and effectually to adjudicate upon and settle all the questions involved in the suit, *i.e.*, between necessary parties and proper parties. Basing his opinion on earlier English and Indian authorities, he held that the Court was not bound to decide a dispute in the absence of persons whom it most vitally concerned, and that in the case before him it was the Government who had interfered with the alleged right of the plaintiff by suspending the execution of the resolution of the Taluq Board. Hence he concluded that the Government was a proper party to the suit.

It is not clear to me that Srinivasa Ayyangar, J., would have come to a conclusion contrary to that of his brother Judge, if the later case had come before him ; for different principles appear to be involved in the two cases. The question of the validity of the Act could certainly have been decided in the absence of the Secretary of State in the first case, though it might have been convenient to have him represented before the Court. In the second case it was in effect the action of the Government itself of which the plaintiff complained. But it is obvious that in the later case a wider view was taken of the powers conferred by O. 1, r. 10, and stress was laid rather upon the words "effectually and completely to adjudicate upon and settle all the

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1. A.I.R. 1929 Mad. 443.

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questions involved in the suit" than upon the words 'necessary to enable the Court' which preceded them. The Allahabad High Court appear to have gone further in *Jaimala Kunwar* v. *Collector of Saharanpur*[1] and to have held that the Court has inherent powers of its own in the matter which are not restricted by O. 1, r. 10; but I should always hesitate to rely on unspecified and undefined inherent powers as a justification for any action taken, if it is possible to avoid doing so. In any case, the first of the Madras decisions is directly in point in the present case, though the report does not indicate how the question of *ultra vires* in fact arose in connection with the provincial statute which was under discussion, nor is it easy to see how, under the Government of India Act, 1919, and the Devolution Rules, questions of *ultra vires* in the case of provincial statutes could have come before the Court. The decision in the later case may have been justified on the facts, but those facts were very different from those which are now under consideration.

Since the new Constitution Act, however, the position with regard to the competence of Indian Legislatures, whether the Central Legislature or the Legislatures of the Provinces, is completely changed; and the cases which have already come before this Court during its brief history show the difficulty and complexity of the diputes in which questions of legislative competence are involved. I think that it would be a matter of great regret to this Court if in any such case it had not the assistance of the Advocate-General of the Province concerned, and this point was not overlooked when the Rules of the Court were drafted (*see* Federal Court Rules, O. 36). But in the absence of such an express rule in the Code it is necessary to decide, first, whether the Advocate-General was rightly empowered to intervene as a party on the record, and, secondly, whether in the particular circumstances of the present case he has an independent right of appeal.

It can but rarely happen in cases between private persons involving, the constitutional validity of a statute, that an Advocate-General is a "necessary" party; and I am not prepared to say without further consideration that he is even a "proper" party in each and every case. But in a number of cases of which the present is an example, the question whether a statute is or is not valid involves the question of the scope of the executive authority of the Province. The executive authority of a Province vests in the Governor on behalf of the Crown, and extends to all matters with respect to which the Legislature of the Province has power to make laws (S. 49 of the Constitution Act.) If then a provincial Act purporting to confer powers upon the executive is held to be beyond the competence of the Provincial Legislature, the scope of the executive authority of the Province is thereby declared to be more restricted than Legislature and Government had supposed or intended. If the Act impugned in the present case is held to be invalid, orders issued by

1. (1935) I.L.R. 55 All. 825.

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or under the authority of the Provincial Government in the past can be questioned in a court of law, and the Government would have no power to issue any orders of the kind in the future. It is therefore impossible for a Court so to decide in litigation between private parties without imposing a hitherto unsuspected restriction upon the powers of the Government; and it does not seem right that this should be done without the Government being a party to the proceedings before the Court. In my opinion the Advocate-General of the Province is a proper party in the sense that without him the Court cannot effectually and completely adjudicate upon and settle all the questions involved in the suit. I am not prepared to extend the operation of O. 1, r. 10, beyond what is necessary, but it seems to me that to allow the Advocate-General to intervene as a party in cases of this kind is for the reasons which I have given within this spirit and I think also the letter of the rule.

The Judicial Committee held in *Esquimalt and Nanaimo Railway Company* v. *Wilson*[1] that when an action, if successful, will affect the rights claimed by the Crown, but the plaintiff has against the Crown no claim to which the procedure by petition of right is applicable, the Attorney-General is nevertheless a necessary and proper party and may be joined as a defendant by the plaintiff. In that case the validity of a Crown grant, and not of a statute, was challenged, but I draw attention to the following observations of Lord Buckmaster, who delivered the judgment of the Committee :—" It is quite true that the title of the Crown to the land in question is not in controversy, nor is the Crown asked to do any act or grant any estate or privilege; but in the event of the plaintiffs' success, the rights existing in the Crown and consequent upon the grant to the respondents will cease. If these interests lay in a third party, he ought certainly to be added as a defendant and that is the best means of testing the necessity of the attendance of the Crown " (at p. 363). Adapting these words, I might say that in the event of the lessors succeeding in the present case, certain rights of the Crown, that is, of the executive, of the Province will cease to exist, in the sense that they will no longer have that extended effect which it was believed that the impugned Act had given them. In a recent case in a Canadian Province, *Beauharnois L. H. & P. Co.* v. *Hydro-Electric Power Commission*[2] a local judicature Act had provided that no Act of the Provincial Legislature should be adjudged invalid in any proceedings until after notice had been given to the Attorney-General of Canada and to the Attorney-General of the Province and that the two Attorneys-General were entitled as of right to be heard, notwithstanding that the Crown was not a party to the proceedings. This enactment was held not to preclude the making of the Crown, represented by the Attorney-General, a party to an action, and the Court stating that in cases admitting of doubt it was desirable that the Crown should be made a party, declared

1. (1920) A.C. 358.
2. (1937) 3 D.L.R. (Ont.) at p. 458.

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the Attorney-General to be a proper, if not a necessary, party to the litigation before it. It is not necessary for me to say whether I agree with this more general proposition ; I am content to limit my observations to cases where to challenge the validity of a statute would, if successful, affect the executive authority of the Province. It would no doubt be often, perhaps usually, convenient if the Court had the Advocate-General of the Province before it, when the validity of a provincial statute is in issue ; and High Courts may desire to consider whether they should not frame a rule of their own upon the subject, which will set all doubts at rest.

It seems to me however by no means to follow that, because the Advocate-General of the Province has been permitted to be put on the record as an intervener in the suit, he is also entitled to prefer an independent appeal to this Court, in the absence of any appeal by the parties. He has an interest in the litigation, it is true but the suit is after all between private parties; and if they are content with the decision of the Court, whether it be in favour of the plaintiff or the defendant, it is difficult to see on what principle the Advocate General can be held to have a *locus standi* sufficient to justify an independent appeal of his own. If one of the parties appeals, then of course the Advocate-General has a right to appear before this Court, since he is an intervener in the suit ; but he is a party only in a very special and limited sense. The doubts which I have felt on this point are not diminished by a very recent decision of the Canadian Supreme Court : *Attorney-General of Alberta (Intervenant)* v. *Kazakewich*[1]. In that case the Supreme Court of Alberta had held that a statute under which a husband had been ordered to pay a certain sum towards the maintenance of his wife was beyond the competence of the Provincial Legislature to enact. The Attorney-General of the Province had intervened to uphold the validity of the Act, and special leave to appeal to the Supreme Court of Canada had been granted both to the Attorney-General and to the wife ; but the wife failed to perfect her appeal. The Supreme Court were of opinion that though, on an appeal to the Court by the wife, the Attorney-General would in the ordinary course have the right to appear in order to support the validity of the Act, he had no status to appeal to the Court, so long as the wife had not perfected her appeal, and that until she had done so the Court had no jurisdiction. This decision seems to me, if I may respectfully say so, to be based upon sound principle, and in my opinion this Court ought to follow it. There is a significant observation by Lord *Haldane* in *John Deere Plow Co.* v. *Wharton*[2], that Attorneys-General intervening in private litigation were only entitled to present their views to the Judicial Committee and had no right of reply. If an Attorney-General had in such circumstances an independent right of appeal of his own, it is difficult to see why he should not be allowed a right of reply like any other appellant.

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1. (1937) Can.S.C.R. 427. 2. (1915) A.C. 330 at p. 334.

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I should be disposed to hold therefore in favour of the lessors on the preliminary point; but as both my brethren are of a different opinion, I will not formally dissent from them. I am very conscious of the difficulty which might be caused if the doubts which I have thought it right to express were justified, for private persons could by a private settlement of their dispute, or even by collusion, prevent a Provincial Government from obtaining a decision of the Federal Court on issues of the highest importance. This is a matter which might well engage the attention of the Central Legislature, who have power under S. 215 of the Constitution Act to make provision for conferring on the Federal Court such supplementary powers not inconsistent with any of the provisions of the Act as may appear necessary or desirable to enable the Court more effectively to exercise the jurisdiction conferred upon it by or under the Act.

I now come to the impugned Act itself. The preamble to the Act runs as follows: "Whereas it is necessary to regularise the remissions of rent made before the passing of this Act on account of the fall in prices": and S. 2 then provides that "notwithstanding anything in the Agra Tenancy Act, 1926, or the Oudh Rent Act, 1886, or in any other law for the time being in force where rent has been remitted on account of any fall in the price of agricultural produce which took place before the commencement of this Act, under the order of the Provincial Government or any authority empowered by it in that behalf, such order, whether passed before or after the commencement of this Act, shall not be called in question in any civil or revenue court." All three Judges in the High Court have held that these provisions were beyond the competence of the United Provinces Legislature by reason of S. 292 of the Constitution Act. That section provides that "notwithstanding the repeal by this Act of the Government of India Act" (that is to say, the Government of India Act, 1919), "but subject to the other provisions of this Act, all the law in force in British India immediately before the commencement of Part III of this Act shall continue in force in British India until altered or repealed or amended by a competent Legislature or other competent authority." It is said that since these words keep existing British Indian Laws in force *until* they are altered or repealed or amended by competent authority, it is beyond the powers of any authority, no matter how competent otherwise, to legislate with retrospective effect; because, if they do so, they are contravening the provisions of the section which make those laws continue in force up to the moment of alteration, repeal or amendment. The purpose of S. 292 was clearly to negative the possibility of any existing Indian law being held to be no longer in force by reason of the repeal of the law which authorized its enactment; and it is a safeguard usually inserted by draftsmen in similar circumstances. An analogous provision was included in S. 130 of the Government of India Act, 1919, though in that case it took the form of a proviso that the repeal of earlier Government of India Acts should not affect the validity of any existing law. The Union of South Africa Act, 1909, S. 135, is almost identical with S. 292, but a slightly different formula

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was adopted in the British North America Act, 1867, and in the Commonwealth of Australia Constitution Act, 1900. S. 129 of the former is as follows: "Except as otherwise provided by this Act, all laws in force in Canada, Nova Scotia or New Brunswick at the Union . . . . . shall continue in Ontario, Quebec, Nova Scotia and New Brunswick respectively as if the Union had not been made; subject nevertheless . . . . . to be repealed, abolished or altered by the Parliament of Canada, or by the Legislature of the respective Province, according to the authority of the Parliament or of that Legislature under this Act." S. 108 of the Australian Act is as follows: "Every law in force in a Colony which has become or becomes a State, and relating to any matter within the powers of the Parliament of the Commonwealth shall, subject to this Constitution, continue in force in the State; and until provision is made in that behalf by the Parliament of the Commonwealth, the Parliament of the State shall have all such powers of alteration or repeal in respect of any such law as the Parliament of the Colony had until the Colony became a State."

I pause here to inquire what reason there can have been for Parliament to place such a fetter as is suggested upon the powers of the new Indian Legislatures. No such fetter was imposed by S. 130 of the Government of India Act, 1919, for there is nothing in the words of that section which could by any stretch of language be construed as a prohibition of retrospective legislation. But the suggestion now is that the new Legislatures set up by the Act of 1935, which have certainly been given powers no less wide than those of their predecessors, have nevertheless had a restriction imposed upon them which Parliament admittedly saw no reason to impose at an earlier date. I agree that it is not for this Court to speculate upon the reasons which may have induced Parliament to legislate in one way rather than another; but when I am told that these novel and unexpected provisions have been enacted and that no apparent reason can be assigned for them, I am entitled to ask whether it is not possible to place a different and more reasonable construction upon the language which Parliament has used. It then appears that Parliament has used almost identical language when it enacted the constitution of the Union of South Africa; and the industry of counsel was unable to suggest, nor have I myself been able to discover, that the interpretation which commended itself to the High Court of Allahabad has ever been even hinted at in any South African Court. The same may be said of the Canadian and Australian sections; for though it is true that the wording of those sections is a little different, I confess that I can detect no difference in the meaning of the language used.

I find myself unable to agree with the decision of the High Court on this point, and it is only out of respect for the three learned Judges who have taken a contrary view that I have dealt with the question at any length; for, but for their unanimous opinion, I should have thought it scarcely open to argument. It must always be remembered that within their own sphere the

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powers of the Indian Legislatures are as large and ample as those of Parliament itself; *The Queen* v. *Burah*[1]; and the burden of proving that they are subject to a strange and unusual prohibition against retrospective legislation must certainly lie upon those who assert it. I can see nothing in the language of S. 292 which suggests any intention on the part of Parliament to make them subject to that prohibition, nor, so far as that may be relevant, any explanation why Parliament should have desired to do so. The sections in the Dominion Acts to which our attention was called do not seem to have been cited to the learned Judges in the High Court; and I cannot but think that their decision might have been different if they had had those sections before them.

Apart however from the above considerations, I doubt whether the Regularization of Remissions Act does in fact alter, repeal or amend any existing Indian law. There is nothing in it inconsistent with, or repugnant to, the Agra Tenancy Act, 1926. No doubt it adds another case in which a tenant may claim the benefit of remissions of rent as against his landlord to those already specified in the latter Act, but it appears to me to have succeeded in doing so without touching any of the provisions of that Act itself.

The view that the Regularization of Remissions Act was invalid because it was not enacted " with respect to " any of the matters enumerated in List II or List III of the Seventh Schedule to the Constitution Act, though it was strenuously argued in this Court, only found favour in the High Court with Iqbal Ahmad, J., the two other Judges holding that the Act was within items Nos. 2 or 21 of List II, or partly within one and partly within the other. These two items are as follows :—

" 2. Jurisdiction and powers of all Courts except the Federal Court, with respect to any of the matters in this List; procedure in Rent and Revenue Courts."

" 21. Land, that is to say, rights in or over land, land tenures, including the relation of landlord and tenant, and the collection of rents; transfer, alienation and devolution of agricultural land; land improvement and agricultural loans, colonization; Courts of Wards; encumbered and attached estates; treasure trove."

I am of opinion that in enacting the Act the Legislature has legislated with respect to matters covered by item No. 21.

The subjects dealt with in the three Legislative Lists are not always set out with scientific definition. It would be practically impossible for example to define each item in the Provincial List in such a way as to make it exclusive of every other item in that List, and Parliament seems to have been content to take a number of comprehensive categories and to describe each of them by a word of broad and general import. In the case of some of these categories, such as " Local Government ", " Education ", " Water ", "Agriculture " and

1. (1878) 3 A.C. 889.

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" Land ", the general word is amplified and explained by a number of examples or illustrations, some of which would probably on any construction have been held to fall under the more general word, while the inclusion of others might not be so obvious. Thus "Courts of Wards" and "treasure-trove" might not ordinarily have been regarded as included under " Land ", if they had not been specifically mentioned in item No. 21. I think however that none of the items in the Lists is to be read in a narrow or restricted sense, and that each general word should be held to extend to all ancillary or subsidiary matters which can fairly and reasonably be said to be comprehended in it. I deprecate any attempt to enumerate in advance all the matters which are to be included under any of the more general descriptions; it will be sufficient and much wiser to determine each case as and when it comes before this Court. I am moved to make this observation because of a passage in the judgment of Iqbal Ahmad, J., in which he says :—"By the authority given to it to make laws about the " collection of rents " the Provincial Legislature is in my judgment authorized to provide about payment of rent in cash or in kind; to fix the instalments in which rent is to be collected, to make provision about abatement or enhancement of rent, to prescribe the conditions under which the rent may be remitted, to regulate the method by which rent is to be collected and to legislate about kindred matters. The impugned Act however is not with respect to any such matter. It is therefore outside the scope of entry 21 of the Provincial List." I do not know why the learned Judge should assume that the list of illustrations which he gives is necessarily exhaustive. I agree that, if it were, his conclusion might follow logically from his premises; but such *a priori* assumptions are a dangerous guide for the construing of a statute.

The general descriptive words in item No. 21 include " the collection of rents "; and if a Provincial Legislature can legislate with respect to the collection of rents, it must also have power to legislate with respect to any limitation on the power of a landlord to collect rents, that is to say, with respect to the remission of rents as well as to their collection. Item No. 22 of the Provincial List is "Forests"; could it reasonably be argued that the power to legislate with respect to forests did not include a power to legislate with respect not only to afforestation but also to disafforestation? Item No. 24 is " Fisheries "; could it reasonably be argued that this only included the regulation of fishing itself and did not include the prohibition of fishing altogether in particular places or at particular times? I have no doubt that legislation with respect to the remission of rents is legislation with respect to a matter included in item No. 21.

It is then necessary to inquire whether the impugned Act is an Act with respect to " remission of rents ", for, if it is, it follows from what I have just said that it was within the competence of the Provincial Legislature to enact it. In my opinion it is such an Act, although it may also be an Act with respect to something else, that is to say, the validation of doubtful executive

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orders. It does not seem to me necessary to consider what the pith and substance of the Act is, to use a now familiar phrase; for that question does not arise, unless the Court is inquiring whether a particular Act falls within one Legislative List or another. In the present case there is no suggestion of any competition between List I and List II, and if the Act does not fall within List II, (since no one has suggested that it falls within List III), it can only be an act with respect to a subject-matter which has been overlooked or forgotten, and no Legislature in India could deal with it until the Governor-General had exercised his powers under S. 104 of the Constitution Act. The validation of doubtful executive acts is not so unusual or extraordinary a thing that little surprise would be felt if Parliament had overlooked it, and it would take a great deal to persuade me that legislative power for the purpose has been denied to every Legislature, including the Central or Federal Legislature in India. It is true that "Validation of executive orders" or any entry even remotely analogous to it is not to be found in any of the three Lists; but I am clear that legislation for that purpose must necessarily be regarded as subsidiary or ancillary to the power of legislating on the particular subjects in respect of which the executive orders may have been issued.

I arrive at the conclusion therefore that the remission of rent is a matter covered by item No. 21, that the impugned Act is an Act with respect to the remission of rent, and that it was within the competence of the United Provinces Legislature to enact it. On this view of the matter, it is not necessary to decide whether the Act is also with respect to matters covered by item No. 2, that s to say, "Jurisdiction and powers of the Provincial Courts"; but if it had been otherwise, I should have been disposed to say that the jurisdiction and powers of the Courts are not affected merely because certain executive orders are not allowed to be questioned in any Court. If the Act had provided, as it well might, either that these particular orders, if produced from the proper custody, should prove themselves, or (if the Act is to be given a rather wider interpretation) that they should be conclusively presumed to have been lawfully made, then it does not seem to me that any doubt could have arisen, unless indeed any Act relating to evidence must also be held to relate to the jurisdiction and powers of the Courts; but this can scarcely be so, in view of item No. 5 in the concurrent List. If on the other hand it were to be contended that the impugned Act was an Evidence Act and therefore in competition with List III, then I should have no hesitation in holding that its pith and substance is rent or remission of rent and not an amendment of the law of evidence, and that therefore it still fell within List II.

Two other points were raised in the course of the argument, but they need only be mentioned to be dismissed. There is nothing in the contention that the Act is void under S. 299 (3) of the Constitution Act, because the prior sanction of the Governor had not been obtained to the introduction of the Bill, since it is completely disposed of by the provisions of S. 109 (2). The contention that the Act bars a civil remedy and therefore conflicts with

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Ss. 4 and 9 of the Code of Civil Procedure, a matter falling under List III, so that by reason of S. 107 (2) of the Constitution Act the assent of the Governor-General would be required to make an Act passed by a Provincial Legislature with respect to it valid, is equally barren of substance. S. 4 of the Code only applies "in the absence of any specific provision to the contrary" and S. 9 excepts suits which expressly or impliedly are not cognizable by the Courts.

But, if, as I hold, the Regularization of Remissions Act was not beyond the competence of the Legislature to enact, the question still remains what is to be the effect of such a decision. The *thekadars*, the original defendants, entered no appearance in this Court, and the Province was the only appellant. The Province was not interested in any way in the original dispute between the plaintiffs and the defendants, save to uphold the validity of a particular law which had been challenged in the course of the proceedings. It is in my opinion impossible for this Court, at the instance of a third party who had no direct interest in the original suit, to order the High Court to vary the decree which it has given as between plaintiffs and defendants; and the difficulties which would arise if any other view were taken lend additional force to the doubts which I have already expressed on the right of the Province to appeal at all. I think therefore that the appeal should be dismissed, and my brothers concur, though for different reasons. In these circumstances it is not necessary for me to express an opinion on two other points which were strongly argued before us by counsel for the lessors, that is to say, whether the Act ought to be construed as having no application in the case of suits pending at the time when it is passed, and whether the provision in it which forbids the remissions from being questioned in a court of law has the effect of validating them for all purposes, and of preventing any suit for recovery of the rent alleged to have been remitted. Many interesting questions of law arise in connection with both these points, which might be profitably discussed on a more appropriate occasion, but I express no opinion on them now.

The appeal will be dismissed. There will be no order as to costs.

Sulaiman, J.:—This is an appeal by the United Provinces which intervened and were impleaded in the second appeal before the High Court. The present suit was instituted on the 5th December, 1934, by two landholders for their share of the arrears of rent for the period, 1339-1341 Fasli (1931-1934 A.D.), against the defendants who were *thekadars* (lessees of proprietary rights in agricultural lands) under a registered document, dated the 20th April, 1928, fixing an annual rent of Rs. 948 and entitling the *thekadars* to make collection of rents from tenants. The defendants claimed a deduction on account of remissions of rent which had been ordered. The Assistant Collector rejected the plaintiffs' contention that remissions could not be set off under the terms of the *thekanama* made a deduction of Rs. 908-8-3 on that account in the rent for the years in suit, and allowing for Rs. 105 as remission in revenue decreed the suit in part. On appeal, the District Judge rejected

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the contention that the scale of remission of rent was excessive and upheld the first court's decree.

On the 26th September, 1935, the landholders appealed to the High Court and in their grounds Nos. 2, 3 and 6 urged that it had not been shown that remissions in revenue and rents were made under S. 73 of the Agra Tenancy Act (Act III of 1926), and that the decision of the Assistant Collector was not final under S. 74 of that Act, which had been misconstrued.

Another suit, which had been filed by Muhammad Abdul Qaiyum, a landholder, in 1935, against the Secretary of State, for a declaration that orders for remission of rents previously made were not legally authorized and for injunction and damages, came up in appeal before the High Court and was disposed of on the 13th May, 1937, *Muhammad Abdul Qaiyum* v. *Secretary of State for India*[1]. The High Court held that the remissions, not being in accordance with S. 73 of the Agra Tenancy Act, were *ultra vires* and illegal, and S. 74 of that Act was not a bar to that suit; but the suit was dismissed on the ground that the then plaintiff should have sued his tenants ignoring the remissions.

While the appeal in the present appeal was pending in the High Court, the impugned Act, *viz.*, The U. P. Regularization of Remissions Act (Act XIV of 1938) came into force on the 24th September, 1938. The appeal came up before a Bench of two Judges who allowed time to the U. P. Advocate-General to consult his Government whether they would like to be heard on the question of the *ultra vires* nature of the impugned Act. Later, the question of law whether Act XIV of 1938, was or was not *intra vires* the legislature, was referred to a Full Bench of three Judges for an authoritative pronouncement. Before the Full Bench the Advocate-General was allowed to be heard on behalf of the Government. Although there were differences of opinion on some of the points raised in the case, all the three learned Judges ultimately came to the conclusion that the Act was *ultra vires* the legislature. The case then went back to the Division Bench. On the 8th April, 1940, an application was presented on behalf of the United Provinces Government praying that the Government be formally impleaded as a party to the case. The application came up for disposal on the 9th April, 1940. The Court ordered, " This application is not opposed. Let the United Provinces Government be made a party to the appeal." On the 12th April, 1940, the Division Bench, accepting the opinion of the Full Bench, allowed the appeal and decreed the claim to the extent of the remissions. On the same date the High Court granted the required certificate under S. 205 (1) of the Government of India Act. The appeal was finally admitted on the 18th June, 1940.

Preliminary Objection.—Mr. Peary Lal Banerji has raised a preliminary objection to the hearing of the appeal filed by the United Provinces. The statement in the order of the High Court that the application was not opposed

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1. I.L.R. (1938) All. 114=(1937) A.L.J. 1396.

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and the fixing of a date with consent, implied that some Advocate for the plaintiffs-appellants was present and did not think it fit to oppose the application. There is no affidavit before us to show that both of the appellants' Advocates were absent, or to show that the Advocate who was present had no authority to accept notice. They admittedly appeared at the next hearing. It is, however, urged that their acquiescence would at best amount to an admission on a point of law that an application for impleading the United Provinces Government was not improper, and so there should be no estoppel against the objection being considered on its merits here.

S. 107 (2), Civil Procedure Code, confers on an appellate court the same power and directs it to perform as nearly as may be, the same duties as are conferred on courts of original jurisdiction. Courts of original jurisdiction have under O. 1, r. 10 (2), Civil Procedure Code, power to order that the name of any person who ought to have been joined or whose presence before the Court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved, be added. A person would be a necessary party if he ought to have been joined, that is to say, in whose absence no effective decree can be passed at all. He would be a proper party to be impleaded if his presence is necessary for an effectual or complete adjudication.

In a suit between a landholder and his tenant, the Provincial Government cannot be considered a necessary party at all, as a proper decree can certainly be passed in their absence. But when in such a suit the validity of an Act of the Provincial Legislature is in question, the adjudication would affect a large section of the public, and the Provincial Government would be indirectly interested in such an adjudication. In the present case the Government were interested to this further extent that the effect of the High Court's ruling would be to nullify certain orders, previously issued by the Government the enforceability of which was indirectly attempted by the impugned Act. Apparently the defendants were too poor to think of preferring an appeal to the Federal Court; and the High Court thought that it would be not only convenient but quite fair to make the U. P. Government a respondent to enable it to secure a more authoritative pronouncement. As the Act was passed during the pendency of the High Court appeal, there was no earlier occasion on which the Government could have been impleaded.

It is contended before us that the powers of an appellate court are restricted within the limits imposed by O. 41, r. 20, and that the same restriction is imposed on a court hearing a second appeal under O. 42, Civil Procedure Code. That rule no doubt permits of making a person respondent, who was a party to the suit in the original court, and who has not been made a party to the appeal, but is interested in the result of the appeal. Obviously, this rule would not apply to the present case. But the language of the rule does now show that it is exclusive or exhaustive so as to deprive a court of any

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inherent power which it may possess and can exercise in special circumstances and which has been saved by S. 151, Civil Procedure Code.

The Allahabad High Court in *Jaimala Kunwar* v. *Collector of Saharanpur*[1] referred to some cases where it had been held that there is also an inherent jurisdiction to add a new party even outside O. 41, r. 20. There is nothing in the case of *Shyam Lal Joti Prasad* v. *Dhanpat Rai*[2]; which in any way conflicts with this. Unfortunately, the head-note of that case is incomplete. It was obviously not intended to lay down that the appellate court has no power to implead a person who was no party to the original suit at all. All that was said was that there was no such power under O. 41, r. 20, Civil Procedure Code. It was pointed out that S. 107, Civil Procedure Code gives an appellate court powers, generally speaking, of the trial court. In that case the District Judge had impleaded a new person in the appeal and then set aside the decree of the first court and "remanded the case for *retrial*." It was pointed out by the High Court that the proper procedure was to remand the case to the first court with the direction to impead that person and then to proceed to dispose of the case. It would then have been possible for this new party to file his written statement upon which the court would be in a position to consider whether there should be a trial *de novo* on all the issues or whether only some of the issues should be retried. The order of the District Judge for the trial *de novo* before knowing what pleas the new party would take, was considered wrong. It was therefore suggested that the more appropriate course should be to direct the court below to implead him and give him an opportunity to file a written statement. In the present case the impleading of the United Provinces Government necessitated no retrial. *Pachkauri Raut* v. *Ram Khilawan Chaube*,[3] was a peculiar case where a *pro forma* defendant, who had benefited under the first court's decree, was not impleaded in the first appeal by the principal defendants and was sought to be impleaded in the second appeal by the same defendants long after limitation had expired. The High Court naturally declined to implead him. The earlier cases referred to therein, were under the previous Code. I, therefore, find it difficult to hold that the High Court had no jurisdiction at all to implead the United Provinces Government as a party to the appeal, particularly when no objection was taken on behalf of the plaintiffs on that occasion. If there were no such jurisdiction at all, then the Provincial Government cannot appeal.

Really, the question before us is not whether the United Provinces Government were rightly impleaded. As regards that point, I myself may prefer a different course. The only question that now remains is whether the appeal itself is incompetent on the ground that the High Court erred (assuming that it did) in impleading the United Provinces Government. If the discretion was wrongly exercised, that would be no ground for holding that the appeal itself does not lie. S. 205 (2) of the Government of India Act lays down

1. (1933) I.L.R. 55 All. 825 at p. 832.
2. (1925) I.L.R. 47 All. 853.
3. (1915) I.L.R. 37 All. 57.

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that where the certificate under sub-s. (1) has been given (as it has been done in the present case) "any party in the case" may appeal to the Federal Court, on the ground that any such (constitutional) question, as aforesaid, has been wrongly decided. This was not like a case where an Advocate-General may be allowed to intervene merely to present before the Court the point of view of his Government, if such a duty is assigned to him by the Governor under S. 55 (2) of the Act. In such a case he would have no independent right of appeal. In India we have a specific provision in S. 176 (1) under which a Provincial Government can be sued and therefore made a party by the name of the Province. Here the High Court by an express order brought the United Provinces Government on the record, and then made them a party to the appeal, and indeed it did so with the idea that that would give to the U. P. Government a right to appeal to the Federal Court. It cannot now be said that the U. P. Government were not "any party" in the appeal. S. 205 does not say any party 'directly aggrieved by the judgment, decree or the final order', much less 'directly aggrieved by the decree actually passed.' In the absence of any such restriction in S. 205 and in view of the fact that an appeal lies even on a constitutional question alone without raising any other ground, I am unable to hold that the U. P. Government who were a party to the appeal in the High Court have no right of appeal at all. Whether, if we allow the appeal, we should direct the High Court to exercise powers similar to that given by O. 41, r. 33, Civil Procedure Code, so as to vary the decree, would be another matter.

Several objections were taken to the validity of the impugned Act XIV of 1938. These may be classified under three heads :—

I. The objection, which has been accepted by all the three learned Judges, is that the Act is void as it offends against S. 292 of the Government of India Act.

II. The objection, which has been accepted by one of the learned Judges and not the other two, is that the Act is invalid because it is not with respect to any of the matters enumerated in List II, entries Nos. 2 and 21, or List III, entry No. 4, relied upon by the United Provinces.

III. The objections, which have been rejected by all the three learned Judges, are that—

(*a*) the Act is void as it offends against S. 299 of the Government of India Act ; and

(*b*) it is void because it is repugnant to the existing S. 9 of the Code of Civil Procedure.

The respondents have pressed all these before us.

The last two can be disposed of summarily.

Section 299 of the Act.—The objection taken under S. 299 (3) of the Act that previous sanction of the Governor had not been obtained is completely met by S. 109 (2), as assent was later given to it.

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Section 9, *Civil Procedure Code.*—Similarly the objection that the Act bars a civil remedy and therefore conflicts with S. 9, Civil Procedure Code, has no force. In the first place, even if there were repugnancy, the Act would under S. 107 (1) be void only to the extent of the repugnancy. S. 9, therefore, cannot stand in the way of its applicability to a revenue case. In the second place, S. 9 itself contains an exception in favour of suits of which cognizance is either expressly or impliedly barred. S. 4, Civil Procedure Code, also contains a saving clause. Not being repugnant to any of the provisions of the Code, the impugned Act does not fall under entries Nos. 4 and 15 of List III.

Section 292 *of the Act.*—S. 292 of the Government of India Act contains a saving clause for the continuance of the existing laws.

"Notwithstanding the repeal by this Act of the Government of India Act, but subject to the other provisions of this Act, all the law in force in British India immediately before the commencement of Part III of this Act shall continue in force in British India until altered or repealed or amended by a competent legislature or other competent authority."

The High Court has laid a great emphasis on the use of the expression ". . . . . shall continue in force . . . . . until altered or repealed or amended." Iqbal Ahmad, J., has thought that this section is more than a mere saving or preserving section. Its effect is not merely to declare that the repeal will not affect the validity of the existing laws, but it proceeds further and enjoins that all the laws shall continue in force until altered, repealed or amended. This is thought to imply that the alteration, repeal or amendment of any previously existing law cannot be made with a retrospective effect at all. It is suggested that the word "until" puts a time limit on the power of the legislatures. As regards the plea that the provisions of S. 2 of the impugned Act should be upheld so far as they relate to the orders passed after the passing of the Act, it has been held that the two portions cannot be separated. Bajpai, J., also concurred in holding that S. 292 is mandatory and that the law would continue in force until altered, etc., and that as the impugned Act had attempted to do something indirectly which it could not do directly, this cannot be countenanced. The learned Judge further held that what S. 292 says has to be preserved in terms of the section only, and not in the manner adopted by the U. P. Legislature. Ismail, J., held that as the Agra Tenancy Act, (III of 1926), had been neither repealed nor altered at the time the Act was passed, the legislature was not competent to nullify the provisions of the subsisting Act. The legislature could not take away the rights conferred by the old Act without repealing or altering the Act.

Although there can be no doubt that the main object of enacting S. 292 was to preserve the enforceability of the then existing laws, the language of S. 292 is certainly more emphatic than would have been ordinarily necessary. S. 130 of the Government of India Act, 1919, was a similar section couched in a simple language : "This repeal shall not affect the validity of any law,

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etc., etc." There is a saving provision in S. 129 of the British North America Act, 1867, but the words there are: "All laws in force in Canada, Nova Scotia or New Brunswick at the Union . . . . shall continue in Ontario, Quebec, Nova Scotia or New Brunswick, as if the Union had not been made; subject nevertheless to be repealed, abolished or altered . . . . ." Similarly, S. 108 of the Commonwealth of Australia Constitution Act, 1900, though embodying a somewhat similar provision, has a different phraseology, "Every law . . . shall subject to this Constitution, continue in the State, and, until provision is made in that behalf by the Parliament of the Commonwealth, the Parliament of the State shall have . . . . powers of alteration and of repeal etc., etc." No doubt in Canada and Australia retrospective legislation has been upheld. But in the constitutions of these Dominions the language, as already quoted, is not identical with that used in S. 292 of the Indian Act.

The corresponding S. 135 of the Union of South Africa Act, 1909, is, however, similar in phraseology to S. 292 of the Government of India Act. It says "Subject to the provisions of this Act, all laws in force . . . . . shall continue in force . . . . until repealed or amended, etc., etc." In spite of the departure from the phraseology adopted in the constitutions of Canada and Australia, there appear to be no adequate historical grounds for singling out the Union of South Africa for a different treatment.

There have certainly been several Acts passed by the Union Parliament which have a retrospective operation, particularly in the case of Marriage Laws. Act No. 20 of 1913, amending the law in force in the several Provinces relating to marriage by banns, contained S. 2 which applied to marriages solemnized "before or after the commencement of this Act." Similarly, S. 2 of Act No. XVII of 1921 provided that any marriage contracted before the commencement of that Act, which would have been void or voidable by reason of any law repealed by that Act, shall (subject to two conditions) be deemed to be as valid as if duly solemnized after the commencement of that Act. Again, there have been Acts passed in the Union which came into effect by the assent of the Governor-General later than the date from which their operation began. Act No. 29 of 1922, relating to the payment of duty upon the estates of deceased persons and in respect of successions to inheritances, is an instance in point. Our attention has not been drawn to any case where the validity of any South African Act, with a retrospective effect, has been challenged. The passing of such Acts merely shows the interpretation put on S. 129 of the Union Act by the South African Legislature and does not take us very far, so long as there is no judicial pronouncement on their validity.

The difference in the language employed in S. 130 of the old Act and S. 292 of the new Act is certainly marked. The former is in a negative form: "Provided that this repeal shall not affect the validity of any law etc., etc." The latter is in a positive form: "Notwithstanding the repeal .... all the law . . . . shall continue in force . . . . until repealed, altered, or amended etc., etc." The former is a mere saving clause, pure

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and simple, its effect being to make it clear that the mere repeal of the previous Government of India Act shall not *ipso facto* put an end to the other laws previously in force. The latter is a little more than that, inasmuch as it affirmatively continues the other laws until such laws are hereafter altered, repealed or amended. In the former section, the word "repeal" related to the constitutional Acts specified in the Schedule attached. In the latter section "repealed etc.," refer to the other laws which are not repealed etc., by the Government of India Act, 1935, but may thereafter be repealed etc. The effect certainly is that until altered, repealed or amended, such other laws do continue in force. The High Court was apparently impressed by the obvious departure from the phraseology of the old section 130, as such a deliberate change is not ordinarily made without a special significance.

There is no doubt that the word "until" does ordinarily connote a point of time. 'Until altered, repealed or amended' is equivalent to saying 'until the alteration, repealment or amendment.' This can have two possible meanings—first, until the date from which the alteration, repealment or amendment takes place, and second, the date on which the Act altering or repealing or amending the previous law is actually passed or rather when it comes into force. If the Act is retrospective, it would obviously operate from a date earlier than that on which it comes into force. If the view taken in the High Court were to prevail, then no legislation altering, repealing or amending the law which was in force when the Government of India Act was passed, no matter how long afterwards it comes to be passed, can have any retrospective provision so as to effect any transactions prior in time to the date when such Act is actually passed. It would follow that not only the Provincial Legislature but also the Central Legislature would be debarred from giving any retrospective effect, whatsoever, to any Act by which not only a previous Act but any other law is altered, repealed or amended. This is a drastic consequence which, it is difficult to believe, could have been contemplated. As long ago as 1878, their Lordships of the Privy Council in *The Queen* v. *Burah*[1], when speaking of the powers of the Indian Legislature remarked: "when acting within these limits it is not in any sense an agent or delegate of the Imperial Parliament, but has, and was intended to have, plenary powers of legislation as large and of the same nature as those of Parliament itself." Even though we are not concerned with the wisdom of the legislature, one cannot help saying that there appears to be no adequate reason why the power to give retrospective effect to a new legislation should be curtailed, limited or minimized, particularly when S. 292 applies not only to statutory enactments then in force but to all laws, including even personal laws, customary laws and common laws. The suggestion made on behalf of the respondents that the idea was not to permit retrospective legislation having effect from a date earlier than the coming into force of the Government

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1. (1878) 3 A.C. 889.

of India Act when legislative powers of the Centre and the Provinces were separately allocated cannot be accepted, because the effect would be not only to stop at the year 1937, but to prohibit retrospective legislation right up to the date of the passing of any new Act, no matter how long after 1937 that may happen. If there are two possible interpretations, it is the duty of a court to accept that one which is more reasonable, more consistent with ordinary practice and less likely to produce impracticable results. It must, therefore, be held that there is nothing in S. 292 of the Government of India Act which debars the Central or a Provincial Legislature, which has altered, repealed or amended a previously existing law, from giving the new provision a retrospective effect from dates earlier than when the Act is passed.

One must not, however, overlook the important provision that the previously existing law must in any case continue in force, until altered, repealed or amended. Unless therefore, there is an Act which actually alters, repeals, or amends it, that law must, in view of the provisions of S. 292, continue in force and cannot be considered as non-existent. Those provisions not merely preserve such laws but keep them in force until actually altered, repealed or amended.

But it is not absolutely necessary that a statute must be repealed by express language, *e.g.*, shown as repealed in an attached Schedule. Repeal, and certainly alteration or amendment, can be effected by necessary implication also. When two Acts are clearly inconsistent with or repugnant to each other, the former will be deemed to have been impliedly repealed or amended, as the last expression of the will of the legislature must always prevail. But they must really be irreconcilable with each other. Two negative enactments need not, however, be contradictory. An earlier statute expressed in negative language may be included in or absorbed by a later statute expressed in a similar negative language, but with a wider scope. The former in such a case would not be repealed, nor even necessarily altered by the latter, as they both can stand together, but it can be said to have been amended.

The impugned Act did not in reality repeal, alter or amend the provisions of the law contained in S. 73 of the Agra Tenancy Act. Indeed that was repealed subsequently by Act XVII of 1939. It therefore stood intact in December 1939, by virtue of the provisions of S. 292 of the Government of India Act. What the impugned Act attempted to do was to widen the scope of S. 74 (1) without embodying anything like the provisions of S. 74 (2), which would have destroyed the right to sue. S. 74 (1) of the old U. P. Act prevented any order, passed under S. 73, from being questioned. The impugned Act attempts to prohibit any order for remission from being questioned, without saying any order "under" or "in accordance with" S. 73. It follows that without altering the substantive law so as to give a Collector power to order remission of rent exceeding the remission of revenue in proportion, it has merely created a further bar which completely restricts a civil right to challenge it under S. 9, Civil Procedure Code. Whether valid or

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invalid on any other ground, it cannot be said to offend against the provisions of S. 292 of the Government of India Act.

List II, Nos. 2 and 21.—While Iqbal Ahmad, J., has held that the subject-matter of the impugned Act does not fall within any of the entries in List II or List III of the Seventh Schedule of the Act, both Bajpai and Ismail, JJ., have held that it falls under these two entries.

It is true that the three Lists even if taken together may not prove to be absolutely exhaustive. As legislation can cover a very wide range, it is quite possible to conceive of cases which are not comprised in any of the Lists. It was with the consciousness of this possibility that provision as to residual power of legislation was made in S. 104 which assumes that there may be a matter with respect to which a law may be enacted, which is not enumerated in the Lists of the Seventh Schedule. But the Lists are so comprehensive that apart from Personal Laws it would be only extremely rare cases which would not be covered by them at all.

Entry No. 21 of List II includes ' land, with rights therein, land tenures, including the relation of landlord and tenant, and the collection of rents,' besides other categories. This itself has a wide scope. If the impugned Act were in pith and substance one for remission of rent, it would be impossible to exclude it from this entry. Entry No. 2 of List II includes jurisdiction and powers of all courts, with respect to any of the matters in that List. Accordingly, entries Nos. 2 and 21 read together would cover any restriction that may be imposed on the jurisdiction and powers of courts with respect to land, land tenures, relation of landlord and tenant, and collection of rents. As there is no category in List I or List III which is similar to entry No. 21 of List II, the latter must be given a liberal interpretation so as to invest Provincial Legislature with full power to legislate with respect to them, so long as such legislation does not conflict with any other provision. I am not prepared to hold that entry No. 21 must necessarily be confined to substantive provisions and not to procedural law. Methods of collection of rent may be a matter of procedure and yet fall under this head. Provisions as to registration of leases, functions of special officers in fixing rents and giving of certain notices, may well be procedural and yet fall within this entry. These are but a few instances. On the other hand, legislation, which affects the jurisdiction and powers of civil or revenue courts would come under entry No. 2. Legislation affecting procedure in rent and revenue courts would also fall under the same entry. But mere procedure in civil courts will be outside those entries, and can only come under entry No. 4 of List III. The result is that if the subject-matter is within entry No. 21, then restriction on jurisdiction and powers of civil and revenue courts with respect to it would also be within the authority of Provincial Legislatures. If, however, the matter itself is not within List II, then it cannot be brought under entry No. 2 of that List which in express terms refers only to matters in that list.

Tenancy Law.—The defendants were *thekadars* holding under a registered lease of proprietary rights, (including a right to receive rents and profits),

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from the landholders for a term of years on a fixed annual rent. The word tenant in the Agra Tenancy Act excludes a *thekadar*, though certain specified provisions relating to tenants, including Ss. 73 and 74, also apply to them. (*See* Chapter XIII of the Agra Tenancy Act, 1926). Outside that Act the United Provinces Government had no special power to interfere with the agreement between a landholder and his *thekadar.* The landholder would be entitled to enforce the liability of the *thekadar* to pay the rent. There are provisions for enhancement and abatement of rent, subject to certain limitations, but with them the Government were not concerned. There was no power given to the Government themselves to order remission of rent in individual cases. Under S. 72, if remission of rent were granted by a court on account of drought, hail, deposit of sand or other like calamity, then proportionate remission of revenue was to be ordered by the revenue authorities subsequently. S. 73 (1) was intended to cover the converse case. When for any cause the local Government or any authority empowered by it, had in the first instance " remitted or suspended" whole or part of revenue, a Collector, or if so empowered by Government, a first class Assistant Collector, might order the remission or suspension of rents to an amount " which shall bear the same proportion to the whole of the rent payable in respect of the land as the revenue of which the payment has been so remitted or suspended." Under Sub-S. (2), where revenue has been wholly or partly " released, compounded for or redeemed," remission or suspension of rent could be ordered by such authority and in accordance with such scale as the local Government may by rule direct. This sub-section did not apply to the case where revenue had been " remitted or suspended." Sub-S. (3) made this provision applicable to a *thekadar*. S. 74 (1) provided that an order "under Sub-S. (1) or Sub-S. (2) of S. 73" shall not be questioned in any civil or revenue court. Sub-S. (2) provided that a suit shall not lie for the recovery of any rent of which the payment has been remitted or suspended " in accordance with the provisions of S. 73." As already mentioned, the High Court in *Muhammad Abdul Quaiyum's*[1] case interpreted these two sections as meaning that a civil suit would be barred only if the order were in accordance with S. 73, that is to say, if the remission ordered by the Collector were in proportion to the remission of the revenue. It further held that the aggrieved landholder could sue for arrears of rent ignoring the order of remission, or pay revenue under protest and sue the Government for refund under S. 183 of the U. P. Land Revenue Act (III of 1901).

The Impugned Act.—If the Provincial Legislature felt that the sections had been wrongly interpreted by the High Court, it was open to it to pass a declaratory or explanatory Act, to make its intention clear. Such a legislation would, of course, have been retrospective in nature, and would have nullified the effect of the High Court's ruling. No such course was followed and instead the impugned Act (U. P. Act XIV of 1938) was passed. The

1. I.L.R. (1938) All. 114.

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preamble stated its object to be to "regularise" the remissions of rent made "before" the passing of that Act, which meant that certain orders already passed, which might have been irregular, were to be made regular by this Act. But in fact the provisions of S. 2 on the one hand fall short of the object by not attempting to validate any invalid orders that might have been passed before, and on the other hand they go beyond the preamble by making orders passed even *after* the Act equally unquestionable. They are in the following terms: "Notwithstanding anything in the Agra Tenancy Act, 1926 . . . . where rent has been remitted on account of any fall in the price of agricultural produce which took place before the commencement of this Act, under the *order* of the Provincial Government or any authority empowered by it in that behalf, *such order*, whether passed *before or after* the commencement of this Act, *shall not be called in question* in any civil or revenue court." There are two provisoes, the first limiting the amount to what may be ordered in the agricultural year in which the Act comes into force, and the other to the period of the settlement. The Act was to come into force when notified.

Interpretation.—The intention of the legislature has to be gathered from the language actually employed in the Act. For statutes which confer or take away legal rights, whether public or private, or alter the jurisdiction of courts of law, express and unambiguous words are necessary. No loopholes should be left for escape. The order of remission dealt with by the U. P. Act is not one necessarily within the four corners of S. 73, nor is there any specific reference to that section. The language actually used can suggest that the section was intended to prevent the order of the Provincial Government, or any authority empowered by it in that behalf, from being questioned. In the main section, the word order is used only when referring to "the order of the Provincial Government or any authority empowered by it in that behalf." This is followed immediately by the words "such order etc." The word "such" ordinarily means "aforementioned.' The normal construction of the section would then imply that such order of the Provincial Government or any authority empowered by it in that behalf, shall not be called in question. A reference to S. 73, Sub-S. (2), shows that where revenue has been "released, compounded for or redeemed" ('and not remitted' or 'suspended' as under Sub-S. (1)), the local Government can nominate an authority and make a rule fixing a scale according to which remission or suspension of rent may be ordered. The Government had no power whatsoever to fix any scale for remission or suspension of rent where revenue had been "remitted or suspended" under Sub-S. (1). Nor can it itself make any order of remissions; it is the Collector who does so in each case under the statutory authority conferred on him by Sub-S. (1). The Government can empower an Assistant Collector of the first class to act instead of the Collector, but the order of remission made by him also will not be "under the order of the Provincial Government" but under S. 73 (1). It is probable that in issuing the notification containing a scale of remissions the distinction between the two sub-sections was overlooked. At any rate for over seven

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years no attempt was made to approach the Legislature to validate such action. Similarly when the bill was introduced it was assumed that the Provincial Government itself could order remissions, and it was on that assumption that the Legislature proceeded to enact that such an order should not be questioned. The words " under the order of the " Provincial Government" have no meaning so far as S. 73 (1) is concerned. On this interpretation, the section would be wholly ineffectual, beacuse in a suit for arrears of rent the landholder is not challenging the scale which the local Government was pleased to lay down, amounting at best to instructions to Collectors, but is challenging the order of the Collector or the Assistant Collector, passed under statutory authority, on the ground that it was not in accordance with S. 73, his suit not being barred under S. 74.

A majority of the learned Judges of the High Court have expressed the opinion that the real object of the U. P. Act was not what it purports to suggest. Iqbal Ahmad, J., has remarked : " Here again the substance of the section, apart from its form, is to regularise and validate irregular and invalid orders as to remissions of rent passed by the Provincial Executive. There is, therefore, no escape from the conclusion that by the impugned Act validity is given to wholly arbitrary and invalid orders already passed or to be passed in future by the executive authorities." He has again remarked : " Now a scrutiny of the impugned Act as a whole leads to the irresistible conclusion that it was designed to, and does in substance, though not in form, validate the invalid orders as to remissions passed by the Provincial Executive . . . . . In short the impugned Act, though disguised as an enactment regulating procedure, is, in fact and substance, an enactment regularizing illegal executive orders. It is a disguised and colourable legislation intended to serve the purpose indicated above, and this is not permissible." Bajpai, J., has said : " The Act pretends to deal with procedure only for it attempts to regularize the remissions of rent and says that certain orders of the Provincial Government shall not be called in question in any civil or revenue court, but this is only a masquerade and the real purport of the Act is to take away the rights of the landlords which were contained in Ss. 73 and 74 of the Agra Tenancy Act, as interpreted by this Court in *Abdul Qaiyum's*[1] case. I, therefore, feel inclined to hold that the Act does not deal merely with matters of procedure but deals with substantive rights as as well." Ismail, J., has not expressed any such opinion.

Past Orders.—As regards past orders, S. 2 does not contain any substantive provision which would even imply that the orders were in fact valid or were being made valid. Nor is there any mention that the liability of the tenant to pay the rent remitted has ceased, and the right of the landholder to realise it has been extinguished. It merely attempts to create a bar against the question being agitated in a civil or revenue court. This is quite a different thing from a substantive provision validating any order that might have been passed in contravention of the provisions of S. 73 of the Agra Tenancy Act.

1. I.L.R. (1938) All. 114.

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The opening words "Notwithstanding anything in the Agra Tenancy Act, 1926" do not amount to an alteration, repeal or modification of S. 73 of that Act. Indeed, not only was S. 73 not mentioned in this Act as having been repealed by it, but was actually repealed later by Act XVII of 1938, which came into force in December of that year. It is possible to conceive of cases, for example where the whole rent has been paid with mutual consent, where the landholder would not stand in need of suing for it, so as to be compelled to call in question the order of remission. His right has not been extinguished, only his remedy in a court of law is barred. The essence of the landholders' grievance is that the Government made them give up their rents in part without in their own turn making compensation to them by giving up a proportionate amount of the revenue. The alleged illegality of the order of remission arises from the circumstance that the Provincial Legislature prevents them from challenging the illegal action of the Government.

Future Orders.—The limit to which the past orders of remission had gone was perfectly known. But as regards future orders, the scope of S. 2 is very wide. The Government could up to June, 1939 (and later if the notification were delayed) issue any order of remissions that it chose. Such an order would be operative irrespective of the extent of the remission, even up to the remission of the entire rent, irrespective of the period of remission, as it can be continued even up to the expiry of the settlement, and also irrespective of the amount of remission of revenue even to the extent of there being no remission of revenue at all. If it is a valid Act, it enabled the Provincial Government to issue an order directing Collectors to remit to all the tenants the whole of the rents for the entire Province for the remainder of the period of the settlement, while not remitting any revenue at all. This would mean that landholders would be compelled to pay revenues to Government, although they would be prevented from realizing any rents at all from their tenants. For all practical purposes, this would amount to an extinction of the relation of landlord and tenant for the time being. Such a measure is highly inconceivable, and yet it is not beyond all possibility that a Government, bent on abolishing zamindari rights, may resort to it under the authority of this section. In spite of the confiscatory powers exercised by the Government, no remedy, whatsoever, would be open to the aggrieved landholders in any civil or revenue court to which alone they can have recourse. This section would therefore invest the Provincial Government with full powers to do what they like, no matter to what extent the contract between a landholder and his lessee is disturbed. Such a drastic interference may well infringe the proprietary rights possessed by landholders, and may also in an extreme case amount to a flagrant breach of the agreement entered into by the Government at the time of the settlement for its duration. Of course, no Act can be invalidated merely on the ground that it may possibly be abused; but in order to see in which List it falls, its provisions have to be examined in their full scope.

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"*With respect to.*"—The crucial point in this appeal is whether this section can be held to be "with respect to" any of the matters mentioned in entry No. 21 of List II, in particular, land, relation of landlord and tenant, and collection of rents. The words "with respect to" are not necessarily the exact equivalent of "relating to" or "connected with." These words may not include a case where the subject of legislation is only remotely related or very indirectly connected with the matters mentioned in the categories. An Act may principally be with respect to some other subject and yet it may incidentally relate to one under consideration. The mere fact that there is a slight, remote or indirect relation or connexion, would not be sufficient to answer in the affirmative the question whether it is with respect to such subject. It is not enough that it should in its working somehow overreach that subject. It has to be seen whether it appertains to such matters substantially and directly, and not only whether it would in actual operation affect any such matters in an indirect way. Again, a provision of law may be partly in one category and partly outside it. The mere fact that it is partly in that category would not suffice for making it valid if it is *ultra vires* with regard to the other portion. When the question is whether any impugned Act is within any of the three Lists, or in none at all, it is the duty of courts to consider the Act as a whole, and decide whether in pith and substance the Act is with respect to particular categories or not. This can be inferred only from the design and purport of the Act as disclosed by its language and the effect which it would have in its actual operation.

Their Lordships of the Privy Council have repeatedly stressed the fact that we must look to the pith and substance of the Act in order to ascertain its true nature and character. As laid down in *Russell* v. *Queen*[1], "The true nature and character of the legislation in the particular instance under discussion must always be determined, in order to ascertain the class of subject to which it really belongs."

In *Attorney-General for Canada* v. *Attorney-General for Ontario*[2], Lord Atkin laid down: "In other words, Dominion legislation, even though it deals with Dominion property, may yet be so framed as to invade rights within the Province, or encroach upon the classes of subjects which are reserved to Provincial competence. It is not necessary that it should be a colourable device, or a pretence. If on the true view of the legislation it is found that in reality in pith and substance the legislation invades civil rights within the Province, or in respect of other classes of subjects otherwise encroaches upon the provincial field, the legislation will be invalid." As it was found that the impugned Act was in pith and substance an Insurance Act affecting the civil rights of employers and employed, it was held to be *ultra vires*. In *Attorney-General for British Columbia* v. *Attorney General for Canada*[3], Lord Atkin, after pointing out the limitation on the plenary power of the Dominion that

1. (1882) 7 A.C. 829 at pp. 839-840. 2. (1937) A.C. 355 at p. 367.
3. (1937) A.C. 368.

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Parliament "shall not in the guise of enacting criminal legislation in truth and in substance encroach on any of the classes of subjects enumerated in S. 92 ," though there would be no objection if there were a genuine attempt to amend the criminal law, remarked: "In the present case there seems to be no reason for supposing that the Dominion are using the criminal law as a pretence or pretext, or that the legislature is in pith and substance only interfering with civil rights in the Province." In *Attorney-General for British Columbia* v. *Attorney-General for Canada*[1], Lord Atkin after agreeing with the view that the sections said to be severable were in fact incidental and ancillary to the main legislation, remarked: "as the main legislation is invalid as being in pith and substance an encroachment upon the Provincial rights the sections referred to must fall with it as being in part merely ancillary to it."

In *Shanon* v. *Lower Mainland Dairy Products Board,*[2] Lord Atkin's remark was quoted: "It is well established that you are to look at the "true nature and character of the legislation," *Russell* v. *The Queen,*[3] 'the pith and substance of the legislation.'" *See also* the *Central Provinces Petrol Tax Case*[4].

Section 2.—The question raised in *Muhammad Abdul Quaiyum's*[5] case was not a constitutional one, but merely turned on an interpretation of Ss. 73 and 74 of the old Agra Tenancy Act. Its soundness has not been questioned before us, and I can only assume that the previous order of remission of rent as held therein was *ultra vires* and illegal. Had the previous order of remission of rent been merely irregular, as not being in strict conformity with the existing law, but without any absence of jurisdiction in the authority issuing it, for instance when some mistake in the calculation of the ratio is made or there has been any other defect of procedure, then S. 2 of the impugned Act would certainly be with respect to "the collection of rents", so far as such orders are concerned, and it would be *intra vires*.

If the order of remission, which the impugned Act attempts to make unquestionable, was in fact wholly *ultra vires* and totally void, issued by an authority not at all competent to do so, with a view not only to benefit the tenants but also to protect Government officers against any suit for damages that may be brought on account of their illegal orders, or protect the Government in a suit brought against it under S. 183 of the U. P. Land Revenue Act (III of 1926), (assuming that the suggestion made in *Muhammad Abdul Qaiyum's*[5] case was correct), then the U. P. Act which merely prevents such an order from being questioned in a civil or revenue court, would not be so much with respect to "collection of rents," as with respect to "validating void orders." There is a clear distinction between challenging the legality of an order in the sense that for non-compliance with certain provisions of law it is invalid or ineffective, and challenging the authority, power or jurisdiction of the person or body, who issued that order. In the latter case the challenge

1. (1937) A.C. 377 at p. 389. 2. (1938) A.C. 708.
3. (1882) 7 A C 829
4. (1939) F.C.R. 18: (1939) 1 M.L.J. Supp. 1.
5. I.L.R. (1938) All. 114.

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is much more than merely calling in question the order itself. It is an assertion that the act of that authority or body was itself a nullity and no more binding than the act of a man in the street. If the U. P. Act, which obviously falls short of validating previous illegal and void orders, is principally for preventing illegal orders from being called in question, then it is more substantially with respect to validating such illegal orders than with respect to the matter to which those orders had originally related. In such a case it would not fall solely within the categories "relation of landlord and tenant" or "collection of rent."

Furthermore, the impugned Act is not confined to the orders of remission previously passed, but goes further and provides that even all future orders of remission, regardless of the fact whether they are or not authorised by any law or are contrary to any existing laws, shall be unquestionable. This is inextricably interwoven into the whole scheme so as not to be separable. The whole purport of the Act is indirectly to invest the Provincial Government with very extensive powers to pass any order of remission which it chooses to do even to the extent of stopping all payments of rents. It thus confers in an indirect way a wide power on the Government or authority empowered by it to pass in the future even arbitrary orders for remission, with or without authority, in utter disregard of the existing legislation. If a legislature cannot itself enact a wholesale deprivation of legal rights, then it cannot by enactment adopt the device of appointing an authority invested with such powers. What the legislature cannot do directly, it cannot do indirectly. *Great Western Saddlery Co. v. The King*[1]. But if it can so enact then the possibility of the power being abused in future cannot invalidate the Act. See *C. P and Berar Petrol Tax* Case[2]. It seems to me that S. 2 goes beyond the subject of remission of rents. In pith and substance, it is an Act not only with respect to "the relation of landlord and tenant" or the "collection of rents", but is also with respect to conferring on the Provincial Government very extensive powers of interference with the legal rights of landholders in their lands. But the category of "land" in entry No. 21 of List II includes "rights in and over land", and is also within the exclusive authority of the Provincial Legislature. Even if by any chance the impugned Act were indirectly with respect to assessment of revenue, it will fall within entry No. 39, and be still in List II. We are not concerned with any unfairness or injustice of the legislation, nor with any injury that may be caused to private rights so long as there is authority to pass it. The only protection available, even though of a limited character, is that contained in S. 299 (3) of the Government of India Act, requiring a previous sanction of the Governor, and if that is gone then a representation that assent should be withheld. It would be too late to object afterwards. The want of a previous sanction of the Governor in the present case is cured by the assent given to the Act subsequently. In view of the fresh tenancy legislation that came into effect in the United Pro-

1. (1921) 2 A.C. 91. 2. (1939) F.C.R. 18; 1939 1 M.L.J. Supp. 1.

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-vinces later, the present case is probably the last pending case in which this difficult point has to be decided.

Pending Action.—The learned advocate for the plaintiffs has in the last resort sought to support the decree of the High Court on the ground that the impugned Act did not apply to the pending action at all. Unfortunately, this point was not raised or argued before the High Court, nor is this a constitutional question. But if we overrule the High Court, we cannot direct it to modify its decree in the light of that Act without disposing of this plea. In that case we must either ask the High Court to do so, or decide the point ourselves.

Undoubtedly, an Act may in its operation be retrospective, and yet the extent of its retrospective character need not extend so far as to affect pending suits. Courts have undoubtedly leaned very strongly against applying a new Act to a pending action, when the language of the statute does not compel them to do so. It is a well recognised rule that statutes should, as far as possible, be so interpreted, as not to affect vested rights adversely, particularly when they are being litigated. When a statute deprives a person of his right to sue or affects the power or jurisdiction of a court in enforcing the law as it stands, its retrospective character must be clearly expressed. Ambiguities in it should not be removed by courts, nor gaps filled up in order to widen its applicability. It is a well established principle that such statutes must be construed strictly, and not given a liberal interpretation.

In *Moon* v. *Durden*[1], a new Act (Gaming Act, 1845), which was passed while an action was pending, was held not to be retrospective in its effect so as to defeat that action, even though S. 18 had said, " *no suit shall be brought or maintained* for recovering money etc." The alternative " or maintained " would ordinarily have been held to be applicable to a pending suit. Nevertheless, Parke B., remarked " It seems a strong thing to hold that the Legislature could have meant that a party who under a contract made prior to the Act had as perfect a title to recover a sum of money as he had to any of his personal property, should be totally deprived of it without compensation."

Similarly in *Smithies* v. *National Union of Operative Plasterers,*[2] S. 4 of the Trade Disputes Act, 1906, was interpreted as not preventing a court from disposing of an action begun before the passing of that Act, although S. 4 had enacted : " *an action* for tort against a trade union *shall not be entertained* by any Court." Again in *Beadling* v. *Goll*[3], the Gaming Act, 1922, which had repealed a section of an earlier Gaming Act, was held by the Court of Appeal not to operate to put an end to the pending action, even though it had enacted that " *no action* for the recovery of money under the said section *shall be entertained* by any Court." In *Henshall* v. *Porter*[4], the court went further and held that the Gaming Act of 1922 did not prevent the bringing of an action under the repealed section of the older Act, even after the date

1. (1848) 2 Ex. 22.
2. (1909) 1 K.B. 310.
3. (1922) 39 T.L.R. 128.
4. (1923) 2 K.B. 193.

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when the repealing Act came into force in respect of a cause of action which had arisen before that date. In *Thistleton* v. *Frewer*[1], followed in subsequent cases, it was held that S. 32 of the Medical Act, 1858, (c. 90) did not apply to an action for medical services begun before that date, but tried after it, although the section had enacted that *no person should* after the 1st January, 1859, recover any charge for medical treatment *unless he shall prove at the trial* that he was on the Medical Register.

The case of the *Colonial Sugar Refining Company* v. *Irving*[2], was pending when the Commonwealth of Australia Constitution Act, 1900, came into force, under S. 73 of which a decision of a Court of any State, from which an appeal would have previously lain to the Queen in Council, became appealable only to the High Court. At page 372, Lord Macnaghten, while considering whether an appeal lay to the Privy Council, laid down the general principles applicable to the retrospective character of a legislation and remarked:- " On the one hand, it was not disputed that if the matter in question be a matter of procedure only, the petition is well founded. On the other hand, if it be more than a matter of procedure, if it touches a right in existence at the passing of the Act, it was conceded that, in accordance with a long line of authorities extending from the time of Lord Coke to the present day, the appellants would be entitled to succeed. The Judiciary Act is not retrospective by express enactment or by necessary intendment." It was further remarked:- " In either case there is an interference with existing rights contrary to the well known general principle that statutes are not to be held to act retrospectively unless a clear intention to that effect is manifested." This view was of course followed by a Full Bench of the Allahabad High Court in *Ram Singha* v. *Shankar Dayal*[3].

In *Khajeh Solehman Quadir* v. *Salimullah Bahadur*[4], their Lordships had to consider the effect of The Mussalman Wakf Validating Act (VI of 1913) of which the preamble had expressly stated : " Whereas doubts have arisen regarding the validity of wakfs created by persons professing the Mussalman faith . . . . . ; and whereas it is expedient to remove such doubts ". S. 3 said " It shall be lawful . . . . . to create a wakf etc." ; and S. 4 said " No such wakf shall be deemed to be invalid etc." Their Lordships held that the Act could not be construed as validating deeds executed before its date. In this case the Act had been passed even before the suit had commenced.

No doubt in *Shyamakant Lal* v. *Rambhajan Singh*[5], this Court applied a new Bihar Money-lenders Act (VII of 1939) which came into force after the filing of the appeal. But S. 13 expressly said : "When an application is made *before or after* the commencement of this Act etc." Since then S. 7 of the new Act has been consistently applied in all the Bihar cases, even in

1. 31 L.J. Ex. 230.
2. (1905) A.C. 367.
3. (1928) I.L.R. 50 All. 965.
4. (1922) I.L.R. 49 Cal. 820=L.R. 49 I.A. 143=43 M.L.J. 385 (P.C.).
5. (1939) 2 M.L.J. Supp. 43.

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suits pending in appeal. But here again S. 7 contains the words "in any *suit brought* by a money-lender . . . . . *before or after* the commencement of this Act in respect of a loan advanced before or after the commencement of this Act or *in any appeal or proceedings in revision arising out of such suit,*" which in express terms refer to a pending suit.

In *Mukherjee* v. *Mst. Ram Ratan Kuer*[1], the new Bihar Act had express words to the effect that *all transactions from* 1910 *shall be deemed to be valid,* which if applicable to the appeal would take away the appellant's right altogether. Their Lordships held that in view of that enactment the appeal should not be allowed.

In *Quilter v. Mapleson*[2], a new Act had come into force, S. 14 of which made the section *applicable to old leases* as well, and which clearly deprived the landlord of a right to claim forfeiture. In that case the landlord had not till then re-entered. The Court of Appeal applied the new Act on the ground that appeals had the character of re-hearing and the appellate court could make such order as ought to be made according to the state of things at that time.

As already mentioned, the landholders in the present case ignoring the order of remission had claimed the full amount of the arrears of rent from the very beginning. Even in the second appeal before the High Court, they had challenged the order of remissions of rent in grounds Nos. 2, 3 and 6 of their Memorandum of Appeal, several years before the impugned Act came into force. They had already called the previous order in question, and that plea was already before the High Court for consideration. The legislature was presumably aware of the previous decision in *Muhammad Abdul Quaiyum's*[3] case and must also have been aware that numerous other suits for arrears of rent must be pending. And yet no express words were put in the impugned Act to show that it should apply to all actions pending in appeal. Further, the provision that no such order shall be called in question has a certain amount of ambiguity in it and leaves it doubtful whether only the parties are prevented from questioning the order or even the court is debarred from ignoring it as having been issued by an unauthorised body, and enforcing the law that has not been repealed or amended by the U. P. Act. Of course, no such bar would exist against the Federal Court; but in declaring what decree should be passed by the High Court it cannot ignore such a bar if it exists. In view of the trend of judicial decisions already referred to, I am of the opinion that the impugned Act was not applicable to the appeal pending before the High Court. The decree of the High Court must, therefore, stand and this appeal should be dismissed.

Varadachariar, J.—The constitutional question arising for decision in this appeal relates to the validity of the Regularization of Remissions Act

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1. (1935) I.L.R. 15 Pat. 268=L.R. 63 I.A. 47=70 M.L.J. 105 (P.C.).
2. (1882) 9 Q.B. 672.
3. I.L.R. (1938) All. 114.

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(XIV of 1938) passed by the Legislature of the United Provinces. A Full Bench of the Allahabad High Court held the Act to be *ultra vires* that Legislature. All the three learned Judges who constituted the Full Bench were of the opinion that as the Act attempted to legislate with respect to a period anterior to the date of its enactment, a period during which another valid Act was in force, it contravened the provisions of S. 292 of the Constitution Act. One of the learned Judges (Iqbal Ahmad, J.) based his conclusion on an additional ground, *viz.*, that the impugned legislation was not one made "with respect to any of the matters enumerated in List II" of the Seventh Schedule to the Constitution Act nor even one with respect to one of those enumerated in the third List. The circumstances that led up to the impugned legislation and to the attack on its legality have been stated in the judgments just delivered. Reference has also there been made to the stage at which the Government of the United Provinces came to be impleaded as a party to this litigation and to the fact that this appeal has been preferred not by the original defendant but by the Government of the United Provinces.

At the hearing of this appeal, the learned counsel for the plaintiffs-respondents took a preliminary objection to the maintainability of the appeal by the Government of the United Provinces. He contended that there was no decree in this case against that Government, that the Government was not aggrieved or affected by the decree of the High Court and that it accordingly had no *locus standi* to prefer the appeal. Though S. 205 of the Constitution Act provides in general terms that "any party" in the case may appeal to the Federal Court, the learned counsel maintained that these general words must be limited in the manner in which S. 96 Civil Procedure Code has been limited and he argued that the mere fact that the United Provinces Government had been formally impleaded as a party in the second appeal would not give it a right to appeal to this Court. He further said that where a person who ought not to have been impleaded had been improperly added as a party by the court such person should not be regarded as a party, competent to prefer an appeal and he insisted that on the admitted facts of the case the order of the High Court impleading the United Provinces Government as a party to the second appeal should be held to be unwarranted and without jurisdiction. In support of his contention that the United Provinces Government should not have been added as a party, he relied on the observations of a learned Judge of the Madras High Court in *Sri Mahant Prayaga Doss* v. *Board of Commissioners for Hindu Religious Endowments, Madras*, [1] and of the Court of Appeal in England in *Moser* v. *Marsden*[2]. He invited attention to the fact that even the allegations made in support of the petition filed in the High Court to join the United Provinces Government as a party did not attempt to bring the case within O. 1, r. 10, Civil Procedure Code or suggest that the Government was at a least a "proper" (if not "necessary") party to the proceeding and he contended that the alleged desire or intention

1. (1926) I.L.R. 50 Mad. 34=51 M.L.J. 148.
2. (1892) 1 Ch. 487.

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of the Government to take the case on appeal to the Federal Court which was all that was set out in the petition was no ground for impleading it as a party. The learned Advocate-General of the United Provinces relied on the circumstance that his petition was not opposed before the High Court; to this, the learned counsel for the plaintiffs replied that even if the absence of opposition should be held to amount to consent, such consent could not cure a defect of jurisdiction and that such consent would not in any event give the United Provinces Government a right of appeal which it did not otherwise possess.

I am free to admit the force of some of these contentions. The circumstance that some of the observations in *Sri Mahant Prayaga Doss* v. *Board of Commissioners for Hindu Religious Endowments, Madras*[1] have been doubted by another learned Judge of the same court in *Secretary of State* v. *Murugesa Mudaliar*[2], does not seem to me to carry Dr. Asthana very far. Again, it is true that in *Jaimala Kunwar* v. *Collector of Saharanpur*[3], the court observed that the power to add parties had not always been limited to cases falling within the language of O. 1, r. 10, Civil Procedure Code; but an examination of the facts of that case and of the decisions referred to in that judgment will show that in these cases, the person added was not really a third party but one who on some recognised principle would be bound by the result of the litigation. In *Moser* v. *Marsden*[4], the Court of Appeal (in reversal of the Trial Court's order) dismissed the application of the third party, even while recognising that that party might be "indirectly" affected by the result of the case. The allegation made in support of the petition in that case was that the defendant on record "will not contest the case properly" and yet Kay, L.J., was content to answer "we cannot help that." It however appears to me that in a case like the present, it will not be right to regard the State as standing *for all purposes* on the same footing as a private third party. Its character as the guardian of the public interests cannot be ignored and it will not be right to limit its *interest* in a litigation strictly to cases in which its pecuniary or proprietary interests or the interests of the public revenue are involved.

In most of the Indian decisions bearing on the question of joinder of parties, the discussion has had to proceed within the limits imposed by the language of the relevant statutory provisions which were in the main intended to deal with private parties. The position of the King as *parens patriae* has long been recognised in this country; but the extent to which the King's law officer is entitled to initiate or intervene in proceedings in courts "to see that justice is done to every part of the King's subjects" (as it is expressed in the old English authorities) has never been clearly or sufficiently defined. As early as in 53, Geo. III, Chap. 155, provision was made authorising the Advocate-General in this country to take such proceedings as His Majesty's

1. (1936) I.L.R. 50 Mad. 34 : 51 M.L.J. 148.
2. A.I.R. 1929 Mad. 443.
3. (1933) I.L.R. 55 All. 825.
4. (1892) 1 Ch. 487.

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Attorney-General may take in the Courts of Equity in England (S. 111). This section was at one time interpreted by the Supreme Court in Madras as authorising the Advocate-General to represent the Crown only in cases involving the pecuniary interests of the Crown. But this narrow interpretation was not endorsed by the Judicial Committee (See *Attorney-General* v. *Brodie*,[1] a case relating to a charity). The section was reproduced in successive Government of India Acts up to 1919 (see S. 114 of the Government of India Act of 1919); but in the Act of 1935 neither S. 16 nor S. 55 follows the same lines. Barring Ss. 91 and 92 of the Civil Procedure Code of 1908 relating to public nuisances and charities and special provisions like S. 26 of the Patents and Designs Act, 1911, and S. 39 of the Lunacy Act, 1912, there are at present no specific provisions in the Indian Statute book empowering the Advocate-General to institute or intervene in any proceedings in the civil courts. And it cannot even be said that a well-defined course of practice has grown up as to the cases or circumstances in which the Advocate-General is entitled to intervene or to be impleaded as a party, apart from his representing the Crown or the Secretary of State in suits in which either the Crown or the Secretary of State happens to be a party. Even in England, the distinction between cases in which the Attorney-General figures as a party and cases in which he only intervenes or is merely heard does not appear to be very clearly marked. The Indian procedure code does not contemplate the Advocate-General "intervening" without himself or the Secretary of State being a party to the suit. The result is that even in proceedings similar to those in which the Attorney-General will merely intervene, according to the English or the Dominion practice, the same result has to be attained in this country by impleading the Government as a party. The new Constitution Act (taken with the adaptation of S. 79 of the Civil Procedure Code) has introduced a further complication as a result of the provision that in suits by or against the Crown, the Governor-General should be named as the plaintiff or the defendant in certain cases, that in certain other cases the Provinces should be so named, and that in a third group of cases the Secretary of State's name should be stated. But in whatever form the cause title may run, the theory is that the Crown is the party. It may be added that even when the Attorney-General figures as the party in England the theory is that the Crown is a party to the litigation through him [see *Attorney-General* v. *Logan*[2], and *Attorney-General* v. *Cockermouth Local Board*[3]]. Such being the state of the law and of precedents as to the position of the Government in this country or the Advocate-General in relation to proceedings in courts, it seems to me that when a question like the present one is raised, it must be decided on broad grounds of justice and convenience and not merely as turning on the interpretation of a particular rule in the Civil Procedure Code.

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1. (1846) 4 Moo.I.A. 190.
2. (1891) 2 Q.B. 100 at p. 106.
3. (1874) L.R. 18 Eq. 172 at p. 176.

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If the practice in England is to be treated as affording any guidance here, it may be useful to refer to two instances. In *Ellis* v. *Duke of Bedford*[1], the Court of Appeal directed the Attorney-General to be added as a party defendant to an action in which certain plaintiffs sued on behalf of themselves and of other growers of fruit, flowers, vegetables, etc., to enforce certain preferential rights to stand in the Covent Garden market. The Lord of the market was the sole original defendant. The action did not relate to a charity nor did it arise out of a public nuisance. The Court of Appeal nevertheless held that the Attorney-General must be before the Court " to represent the public as against the alleged preferential rights of the growers." This direction was referred to with approval by the Judicial Committee in *Esquimalt and Nanaimo Rly. Co.* v. *Wilson*[2]. In In re *Chamberlain's Settlement*[3], P.O. Lawrence, J., directed the addition of the Attorney-General as a party to a proceeding in which the point for decision was whether a tenant for life had forfeited his interests under a particular settlement by reason of his having become a "German National" within the meaning of the Peace Treaty Order of 1919. The tenant for life objected to the addition of the Attorney-General, but the learned Judge overruled the objection, not merely on the ground that the interpretation of the Treaty was a matter which concerned the Crown but also on the ground that the question raised was one "which may affect a large section of the British public." I find it difficult to say whether and if so how the same course could have been adopted by a court governed by the Civil Procedure Code in this country and whether according to the processual law obtaining in this country the Government or the Advocate-General will be the property party to be impleaded, if the principle of the above decision is to be followed here. A decision of a learned Judge of the Calcutta High Court seems apposite here. In *In the goods of Bholanath Pal, deceased*[4], the Advocate-General sought to intervene on behalf of the Secretary of State in a Succession Certificate Proceeding with a view to contend that the High Court on its original side could only grant letters of administration but not a succession certificate. It is possible to suggest that the interests of Government revenue were concerned here, because on the issue of letters of administration succession duty might be payable on the whole estate whereas a succession certificate could be limited to particular debts and the duty payable to Government correspondingly reduced. But the learned Judge (Remfry, J.) did not merely hear the Advocate-General on the question of jurisdiction or court fee, but added the Secretary of State as a party. The very circumstance that in the present case the High Court thought it proper to issue notice to the Provincial Government involves a recognition of the fact that the Government was *interested* in the question raised—presumably as representing the large class of subjects for whose benefit the Act was intended—though its interest may be limited to the general question, *viz.*, the validity of the enactment.

1. (1899) 1 Ch. 494.
2. (1920) A.C. 358.
3. (1921) 2 Ch. 533.
4. (1930) I.L.R. 58 Cal. 801.

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There was also the fact that the remission whose legality was in question had been granted under the orders of the Provincial Government.

It is not however necessary for me to consider at this stage what this Court should do if it had in the first instance to deal with the application made by the United Provinces Government to the High Court in this case; nor does it seem to me useful to speculate what the High Court itself would have done if the application of the United Provinces Government to be joined as a party had been opposed by the plaintiffs. I am not prepared to go so far as to ignore the fact that the High Court has impleaded the United Provinces Government and that this course has been adopted with the consent (express or implied) of the plaintiffs. In my opinion, there is no case here of a defect of jurisdiction in the sense in which it is said that consent cannot cure a defect of jurisdiction. It is true that in *Moser* v. *Marsden*[1], Lindley, L.J., observed that the question was not one of "discretion but of jurisdiction." But as the antithesis shows, the learned L.J., apparently had in mind the difference between the decision of the question of joinder on the interpretation of a rule of law and a direction given by the lower court in the exercise of its discretion, because in the latter case the Court of Appeal would generally be reluctant to interfere. It may even be regarded as a case of excess of jurisdiction within the meaning of S. 115 of the Civil Procedure Code, but that will not make the order *void* in the sense that it may be ignored or treated as if it had never been passed. In *Sri Mahant Prayaga Doss* v. *Board of Commissioners for Hindu Religious Endowments, Madras*[2] the learned Judge intimated that but for the opposition of the plaintiff he might have directed the addition of the Secretary of State as a party.

To the suggestion that the expression "any party" in S. 205 (2) of the Constitution Act must be limited on the lines on which the generality of the language of S. 96, Civil Procedure Code, has been limited by decisions, the answer is furnished by the difference in language between the two provisions. S. 96, Civil Procedure Code, does not in terms say who is entitled to prefer an appeal. But according to the Code it is the "decree" that has to be appealed against. The decisions have therefore laid it down as a matter of inference that a party *adversely affected by the decree* is the only person entitled to appeal. It was however realised that a rule so limited might cause hardship in some cases. An extension was therefore made by conceding a right of appeal to a party who might be bound by a finding in the judgment, though there was no decree against him (see the cases reviewed in *Harachandra Das* v. *Bholanath Das*[3]). S. 205, of the Constitution Act provides for an appeal "from any judgment, decree or final order"—an expression which has received varying interpretations—and sub-section (2) of the section enacts that "any party in the case may appeal." Why should this express provision be qualified by adding the words *if adversely affected by the decree?* It may be

1. (1892) 1 Ch. 487.
2. (1926) I.L.R. 50 Mad. 34=54 M.L.J. 148.
3. (1935) I.L.R. 62 Cal. 701.

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taken as a matter of "common sense that there can and will be no appeal when there is nothing to appeal about" [See *Goldar* v. *Saha*[1]]. But why limit the grievance to a grievance about the decree? Even on the footing that the general language of S. 205 (2) may or must be limited in some manner, it seems to me that its scope ought not to be unduly narrowed so far as the Government (whether Central or Provincial) in this country is concerned. The section is principally concerned with the determination of constitutional questions though arising in a litigation between private parties. The Government stands in a peculiar situation: it has no doubt pecuniary or proprietary interests in one sense, but in another aspect it is also the custodian and the protector of the interests of the public; and the question of the legality of a statute is one in which it has a special interest. It is in view of this consideration that this Court has in O. 36 of its Rules provided for notice of any proceedings being given to the Advocate-General of India or to the Advocates-General of the Provinces and for applications being made by them to be heard in any proceedings before this Court. Both on principle and as a matter of expediency, it seems to me very undesirable to place the Government in this embarrassing position, that while it must deem itself bound by an opinion expressed by the High Court as to the invalidity of a statute, it must find ways of persuading private parties formally to file an appeal, if it desires to have the constitutional question brought up before this Court. The procedure under S. 213 of the Constitution Act may not be found appropriate when the question of the legality of a statute has actually been put in issue before a court of law in a litigation between private parties.

I have already stated that the Indian Civil Procedure Code does not contemplate an "intervention" by the Advocate-General as distinguished from an addition of the Advocate-General or the Government as a party. When either of them has been impleaded as a party with a view to give them a hearing, it seems to me that the Court would fail to give full effect to the language of S. 205 (2) of the Constitution Act if it should hold that notwithstanding such joinder as a party, the Advocate-General or the Government had no right to prefer an appeal. In proceedings relating to charities, it has been held that where the Advocate-General is a party, he is the proper person to appeal against an adverse judgment [*See Jan Mahomed* v. *Syed Nurudin*[2] following *Attorney-General* v. *Wright*[3], see also In re *Rai Rukhia Bai*[4], where the learned Judges took the additional ground that the beneficiary, though he was heard by counsel, was not to be treated as a *party*.] I see no reason why the principle should be different in a case like the present. Neither in the one case nor in the other has the Advocate-General or the Crown or the State any pecuniary or proprietary interest if that is to be the sole test. The right of appeal being a creature of the statute, the right of one who is within the terms of the statute cannot, it seems to me, reasonably be denied

1. (1905) 9 C.W.N. 584 at p. 588.
2. (1907) I.L.R. 32 Bom. 155.
3. (1841) 3 Beav. 447.
4. I.L.R. (1937) Bom. 425.

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when even on the broader ground of interest in the litigation, it is conceded that he is sufficiently interested to justify his claim to be heard. In *John Deere Plow Co.* v. *Wharton*[1], the parties concerned had themselves preferred an appeal to the Judicial Committee and the Attorneys-General of Canada and British Columbia seem to have intervened before the Judicial Committee. The case therefore throws no light on the question of the right of the Attorney-General of the Dominion to prefer an appeal in a case where he had intervened even in the lower court. The report of the decision in *Attorney-General for Alberta (Intervenant)* v. *Kazakewich*[2], referred to in my Lord's judgment is very brief and it does not appear whether the decision was based on the language of any statute and if so what that language was. For the reasons set forth above, I would overrule the preliminary objection.

There is another aspect of the case which also deserves consideration in this connection. The application filed by the United Provinces Government in the High Court put the plaintiffs on notice that that Government sought to come in as a party for the very purpose of placing itself in a position to prefer an appeal to this Court. If the plaintiffs had opposed the petition, the Government might have taken steps to ensure that an appeal was formally lodged by the original contesting defendant. This opportunity has now been lost to that Government and this is in a large measure attributable to the attitude taken by the plaintiffs towards the application in the High Court. This may not create an estoppel nor suffice to confer on the Government a right of appeal which it would not otherwise possess. But if the Government can bring itself within the letter of the law, one need not hesitate to uphold its right to prefer an appeal in such circumstances.

Proceeding now to the question of the invalidity of the impugned Act, it will be convenient to take up first the ground on which all the learned Judges of the Full Bench of the High Court agreed, namely, the objection based on S. 292 of the Constitution Act. As I understand the argument, this objection interprets S. 292 not merely as enacting that the law in force in British India immediately before the commencement of Part III of the Constitution Act shall continue in force notwithstanding the repeal of the earlier Government of India Act, but as also fixing a time-limit up to which the operation of such law should not be disturbed by anything contained in any enactment that may come to be passed by any of the legislatures in British India. It was conceded before us and it was recognised before the High Court that a provision like S. 292 is usually inserted in similar Acts, to indicate that the repeal of the parent Act shall not be deemed to have repealed all the laws passed under that Act. (Compare S. 108 of the Commonwealth of Australia Constitution Act, S. 129 of the British North America Act and S. 135 of the Union of South Africa Act). But laying special stress on the words "until altered or repealed or amended" the learned counsel for the plaintiffs desired to read S. 292 as containing a direction by Parliament that the law then in

1. (1915) A.C. 330.

2. (1937) Can.S.C.R. 427.

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force must in any event continue up to a specified date, namely, the date of its alteration, repeal or amendment by a later Act of the Legislatures in India; and, it was sought to be inferred therefrom that no later Act of such Legislatures can by words of retrospective operation ante-date its effect so as to affect rights acquired under a previous law down to the date of the new legislation. At one stage the learned counsel for the plaintiffs even went so far as to suggest that the Legislatures in India had been deprived by this provision of the power of enacting *at any time* laws with retrospective effect, or they were at least incompetent to extend the retrospective operation of their enactments to a period anterior to the 1st of April, 1937, when the Constitution Act came into operation in the provinces. These arguments were however not persisted in, when it was pointed out that the Indian Legislatures were, within the statutory limits assigned to them, bodies possessing plenary powers [See *The Queen* v. *Burah* [1], *Hodge* v. *The Queen*[2], and *Croft* v. *Dunphy*[3]] and that whatever might be the objection on grounds of reasonableness or expediency to retrospective legislation, there was nothing in S. 292 to deprive the Indian Legislatures of this particular incident of plenary legislative power. [Compare *Phillips* v. *Eyre*[4], relating to an Act of the Jamaica Legislature; and *The King* v. *Kidman*[5], relating to an Act of the Commonwealth Parliament in Australia.] The objection was then limited to the power of the legislature to give retrospective operation to an enactment when, by so doing, it would prevent a law in existence at the date of the commencement of Part III of the Constitution Act from having its full effect up to the date of the repealing or amending Act. It was pointed out that the language employed in S. 292 of the Constitution Act was not identical with that to be found in the corresponding provisions in the British North America Act or in the Commonwealth of Australia Act. But it would appear that this language is so similar to that found in S. 135 of the Union of South Africa Act as to suggest that it might have been taken from it. The reason for a provision like that contained in S. 292 being the one already stated, it does not seem to me necessary or proper to lay undue stress on the word "until" used in S. 292 and hold that the policy of this provision is different from that underlying similar provisions in the other constitution Acts above referred to. I see no justification for drawing a distinction between the statement that the previous law shall continue in force *subject* to repeal or amendment by later legislation and the statement that it shall continue in force *until* repealed or amended by later legislation. That Parliament might have had some reason or motive for denying to the Indian Legislatures the power of retrospective legislation with reference to pre-existing laws seems to me to rest on mere speculation and is not a fair inference from the language used in the section.

In the judgments delivered by the learned Judges of the Full Bench of the Allahabad High Court, I find it stated in some places that S. 2 of the

1. (1878) 3 A.C. 889.
2. (1883) 9 A.C. 117 at p. 132.
3. (1933) A.C. 156.
4. (1870) L.R. 6 Q.B. 1 at pp. 23, 27.
5. (1915) 20 Com.L.R. 425.

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impugned Act in effect repealed S. 73 of the Act of 1926 with retrospective effect or that the provisions of the two Acts were diametrically opposed to each other. With all respect, I find some difficulty in following this view. It is true that the remission which the impugned Act sought to regularise was not one made in conformity with the provisions of S. 73 of the Act of 1926. But such regularisation would only mean the *addition of a new* head of remission ; it may amount to an alteration or amendment of the old Act, but will not necessarily involve a repeal of S. 73 of that Act. The co-existence of two kinds of remission given for different reasons is not inconceivable or impossible. It can of course be said that the impugned Act retrospectively deprived landlords of a share of the rent to which they had already acquired a right. But if on general principles a Legislature has ordinarily power—for reasons which it is not open to the court to investigate—to enact measures which by retrospective operation may deprive some subjects of vested rights, I see no sufficient reason for treating the present case as standing on any special footing. In this view, it will follow that there is no reason for saying (as Bajpai, J., has said) that "the impugned Act has attempted to do something indirectly which it could not do directly."

Reference has been made in the judgments of the learned Judges of the High Court and reference was also made in the course of the arguments before us to the fact that a later Act of the United Provinces Legislature, namely, Act XVII of 1938 took care to repeal Ss. 73 to 75 of the Agra Tenancy Act of 1926 and to add in clause (2) of S. 5 a provision corresponding to clause (2) of S. 74 of the Act of 1926, while the impugned Act contains no provision corresponding to this clause. It does not appear to me that this is any legitimate ground to be considered in the present connection. The policy of Act XVII of 1938 is apparently not the same as that of the Act of 1926, because the conditions and procedure stated in S. 4 of the new Act are not identical with those contemplated in S. 73 of the older Act and that affords a sufficient explanation for the repeal of Ss. 73 to 75 of the old Act.

The additional ground of invalidation relied on Iqbal Ahmad, J., was also pressed before us at some length by the learned counsel for the respondent. With all respect, it seems to me there is even less force in this objection than in the one based on S. 292. The only question to be considered in this connection is whether the impugned Act can reasonably be described as one made " with respect to " any of the matters enumerated in item 21 of List II of Schedule VII of the Constitution Act. Item 2 of that List is only of secondary importance in this case, because the first part of item 2 is governed by the words " with respect to any of the matters in this List"—which takes us to item 21; and the second part, namely " procedure in rent and revenue courts " can scarcely be held to authorise legislation which in effect dealt with substantive rights, by precluding the landlord from objecting to a remission which had been improperly made under executive authority.

Both in the High Court and in the arguments before us, great stress has been laid upon the way in which S. 2 of the impugned Act had been

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worded and it has been said that all that the Act did was to validate arbitrary executive orders. This view does not seem to me to take the whole of S. 2 into account and give due effect to the substance of the enactment. The Preamble recites the necessity for regularising certain remissions of rent and even if we are to exclude the Preamble from our consideration, S. 2 in terms refers to the fact of remission of rent having been made under orders of the Provincial Government by reason of the fall in the prices of agricultural produce which took place before the commencement of the Act. The succeeding words can as a matter of grammar only mean that the order of remission thus passed shall not be called in question. There can thus be little doubt that the Act intended to deal and does deal with the subject of remission of rent made under orders of the Provincial Government. It can make no difference for the present purpose whether it laid down general provisions for remission of rent for all time or dealt with the remission made or to be made in particular years. The subject matter in every one of these cases must be held to be remission of rent.

A point was raised in the course of the discussion before us, whether the words " such order " in S. 2 of Act XIV of 1938 referred to the order of the Provincial Government authorising the remission in general terms or to the consequent orders passed by revenue officers fixing the remission in the case of each individual or holding. I am inclined to think that the reference must be to the order passed by the revenue officers with reference to individual holdings and the reference to the order of the Provincial Government is only to indicate the authority under which the remission was granted. This is to some extent supported by the reference in the proviso to remissions " in excess of the remission ordered for the same holding ", etc. But this again is immaterial, so far as the question of the subject-matter of the Act is concerned. Whether it is the order of the Provincial Government or the consequent order of the revenue officer, the order was one which related to remission of rent and that is the subject-matter of the Act. It was pointed out that the section did not in terms purport to validate the remission, and it was argued that an Act which merely protected from attack an order which granted the remission could not be said to be an Act dealing with remission. This seems to me an unsubstantial distinction. Whatever consequences might flow from the absence of a direct provision validating the remission or precluding the landlord from recovering the remitted rent, the avowed purpose of the Act was to ensure that the tenants had the benefit of the remissions which had been made.

A point was made by the learned counsel for the respondents that S. 100 of the Constitution Act used the expression " with respect to any of the matters enumerated in the List " and not words like " relating to the matters enumerated in the List." It seems to me that the words "with respect to" are not by any means less comprehensive than the words " relating to." [*Cf.*

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observations in *The King* v. *Kidman*[1], at p. 449; Wynes: Legislative and Executive Powers in Australia, at pp. 28, 29]. The significance of these expressions may become important in a case where the impugned legislation contains a number of provisions relating to different matters and a question arises as to whether one set of provisions can be described as "passed in respect of a forbidden subject" or can be considered as only incidentally affecting such a subject while forming part of an Act which in the main deals with an authorised subject (see the antithesis indicated by Lord Atkin in *Gallagher* v. *Lynn*,[2] with reference to the use of the expression "in respect of" in S. 4 of the Government of Ireland Act). In the present case, the Act in question deals with only one matter and the distinction between what is "substantial" and what is only "incidental" does not arise for consideration.

In coming to the conclusion that the impugned Act did not fall within any of the heads enumerated in item 21 of List II, Iqbal Ahmad, J., gave it as one of his reasons that that item could only cover provisions of "substantive law" and that the impugned Act did not embody any provision of substantive law either in respect of rights over land or land tenures or the relation of landlord and tenant or the collection of rent. The fact that the provision is couched in the form of an immunity of the remission order from attack in a civil or revenue court will not, I think, take away from its character as one depriving the landlord of his right to the full rent. It is well settled that the substance of the legislation has to be examined to see what the Legislature was doing, and the form which the statute may have assumed under the hand of the draftsman is not decisive. As explained by Dr. Asthana, it might have been thought sufficient to frame the new Act on the lines of clause (1) of S. 74 of the Tenancy Act of 1926. The learned Judge enumerated certain provisions which he would regard as provisions relating to the "collection of rents." But I do not see why the List given by the learned Judge should be regarded as exhausting all conceivable provisions relating to that head. S. 2 of the impugned Act had a two-fold operation; on the one hand it prevented the landlord from questioning the order of remission with a view to recovering the full rent, on the other, it might also be held to prevent the court *suo motu* from questioning the order of remission. In the latter sense, it might be said to be an interference with the power of the court and it is in answer to such a possible contention that reliance seems to have been placed on behalf of the Government on item 2 of List II.

One or two other objections were mentioned in the course of the argument, but I did not gather that they were seriously meant to be urged. In the result, I am of opinion that the impugned Act was within the sphere allotted to the Provincial Legislature by the Constitution Act, that it was not opposed to S. 292 of that Act and that it was *intra vires* the United Provinces Legislature.

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1. (1915) 20 Com.L.R. 425.
2. (1937) A.C. 863.

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The question still remains what is the decree to be passed in the case, in the view that the impugned Act was valid. The conclusion of the High Court against the validity of the Act will no longer hold good, but will that constitute sufficient reason for modifying the decree of the High Court so far as it relates to the rights of the original parties? According to my reasoning in the earlier portion of this judgment, the United Provinces Government was interested only in the general question and had no other interest in the particular litigation. In *In the goods of Bholanath Pal, deceased*[1], the learned Judge limited the Advocate-General's argument to the question of jurisdiction which, alone he considered was one of public importance. The contesting defendant in the present case does not seem to me to be entitled to ask for a modification of the decree on the principle of Order 41, r. 4, Civil Procedure Code, because there is no "decree" in this case against the Government and hence there can be no question of a decree proceeding "on a ground common to all the defendants." The anomalous situation of a decree passed against several defendants on the same ground being reversed as against some and being allowed to stand as against the rest will not arise in this case. Further the power recognised by this rule as also the one referred to in O. 41, r. 33, Civil Procedure Code, is only discretionary and the present case is not in my opinion one in which any discretionary power ought to be exercised in favour of the contesting defendant. He has not merely acquiesced in the decree of the High Court, he has not even appeared before this Court to explain the circumstances in which he did not choose to appeal nor to ask for its modification. This is significant in view of the suggestion thrown out by Dr. Asthana that the original parties to the litigation have in all probability come to a settlement. I am accordingly of opinion that notwithstanding this Court's acceptance of the appellant's contention as to the validity of the impugned Act, there is no justification for disturbing the decree passed by the High Court in the case.

Two more contentions of the learned counsel for the respondents remain to be noticed. It was argued that Act XIV of 1938 even if valid, would not preclude the plaintiffs, in this case from recovering the full rent due to them, because the Act had not been made applicable to pending actions. There can be little doubt that there is a well-recognised presumption against construing an enactment as governing the rights of the parties to a pending action. *Moon* v. *Durden*[2] is an instance of the extreme limits to which this rule has been carried; for notwithstanding the doubt felt by Baron Parke in that case that the denial of the application of the Act to pending actions would render inoperative the words "or maintained" used in the Act, the Court thought it safer not to apply the statute to pending actions. The Act now under consideration was clearly intended to be retrospective, in so far as it took away certain vested rights which had accrued before the date of its enactment. But the presumption against retrospective operation is said to be so strong that it has been recognised that even in construing

1. (1930) I.L.R. 58 Cal. 801. 2. (1848) 2 Ex. 23.

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an Act or a section which is to a certain extent retrospective, it ought not to be given a larger retrospective operation than the words clearly involve [*see Reid* v. *Reid*[1]]. There are two recognised principles, (1) that vested rights should not be presumed to be affected and (2) that the rights of the parties to an action should ordinarily be determined in accordance with the law as it stood at the date of the commencement of the action. The language used in an enactment may be sufficient to rebut the first presumption, but not the second. Where it is intended to make a new law applicable even to pending actions, it is common to find the legislature using language expressly referring to pending actions. But it will be seen from the decision of the Privy Council in *K. C. Mukherjee* v. *Mst. Ram Ratan Kuer*[2], that it is not necessary that the intention if the Legislature should always be expressed in that particular form. In that case, the enactment validated all transactions subsequent to a *specified* date and their Lordships held that the new law would apply to a transaction of that kind even if it had become the subject of an action prior to the date of the passing of the Act; and in those circumstances they reversed the usual presumption and looked to see whether there was any reservation in the Act in respect of pending actions. The question of the applicability of the impugned Act to pending actions is likely to arise only in a few cases and whatever may be its importance to the parties to those cases, it does not seem to me to be a matter in which the United Provinces Government can be said to be interested. As I have already indicated that as between the original parties to this suit there is no justification for this Court's interference with the decree of the High Court, I do not find it necessary to express any definite opinion on the question of the extent to which the impugned Act operates retrospectively. For the same reason, I refrain from expressing any opinion on the argument urged by the learned counsel for the respondents, as to the effect of the absence from the impugned Act of a clause corresponding to S. 74 (2) of the Agra Tenancy Act, 1926, and S. 5 (2) of Act XVII of 1938. He argued that it might be that the impugned Act prevented the order of remission being questioned in a court, but this would not of itself take away the contractual right of the landlord to the full rent or absolve the tenant from liability for the full amount of the stipulated rent. This again is a question relating to the construction of the Act and does not bear upon the question of its validity; and as it has not been raised or discussed before the High Court, I prefer to leave it alone, as I have held that this appeal should be dismissed for another reason. I agree that there should be no order as to the costs of this appeal.

K. S. —— *Appeal dismissed.*

[The court refused† to grant leave to appeal to the Judicial Committee as the question was not of general public importance.]

END OF SUPPLEMENT OF 1941 1 M. L. J.

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1. (1886) 31 Ch.D. 402.

2. (1935) I.L.R. 15 Pat. 268=70 M.L.J. 105=L.R. 63 I.A. 47.

† Case No. III of 1941 April 17, 1941.